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IN THE

Supreme Court of the United States

SPRINGWELL NAVIGATION CORPORATION,

Petitioner,

v.

THE CHASE MANHATTAN BANK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Petitioner

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QUESTIONS PRESENTED

Gulf Oil Corp. v. *Gilbert,* 330 U.S. 501, 508-09 (1947), sets forth public and private interests to be balanced on a motion to dismiss for *forum non conveniens*. The private interests are "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises * * *; and all other practical problems that make trial of a case easy, expeditious and inexpensive." The public interests are "[a]dministrative difficulties" relating to court congestion; the burden of jury duty for "a community which has no relation to the litigation"; the interest, in "cases which touch the affairs of many persons," of "holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only"; "a local interest in having localized controversies decided at home"; and an interest in hearing a case "in a forum that is at home with the state law that must govern," rather than having a court "untangle problems in conflict of laws, and in law foreign to itself." Plaintiffs receive substantial deference and "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."

The questions presented by this petition are:

1. Whether a foreign beneficiary of a treaty guaranteeing "freedom of access to the courts" is entitled to substantial deference when choosing defendant's home forum instead of a forum that is home to neither party?

2. Whether *Gilbert*'s "compulsory process" factor is inapplicable absent some showing that witnesses would be "unwilling" to appear voluntarily or that the jury would otherwise be unable to assess witness demeanor?

3. Whether *Gilbert*'s foreign-law factor is inapplicable or insubstantial when *both* fora will conduct choice-of-law analysis and apply *mixed* law of shared heritage?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs/Appellants in the courts below were the current petitioner, Springwell Navigation Corporation, and the petitioner in No. 03-412, Pollux Holding Ltd.

Petitioner Springwell Navigation Corporation does not have any parent corporations and no public corporation owns 10% or more of its stock.

Defendant/Appellee in the courts below was respondent The Chase Manhattan Bank.

TABLE OF CONTENTS

Pages

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES v
PETITION FOR WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 2
STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 8

I. The Denial of Deference to Petitioner's Choice of Respondent's Home Forum Conflicts with U.S. Treaty Obligations and with the Decisions of Other Circuits. 8

A. The Treaty-Imposed Obligation To Allow Freedom of Access to the Courts Requires Substantial Deference to a Treaty-Beneficiary's Choice of Forum. 9

B. Plaintiff's Choice of Defendant's Home Forum Deserves Substantial Deference where the Only Proposed Alternative Is a Forum that Is Home to Neither Party. 12

II. *Gilbert*'s Compulsory-Process Factor Is Inapplicable Absent a Showing that Witnesses Are Unwilling To Appear in Plaintiff's Chosen Forum or that a Jury Would Be Unable To Assess the Demeanor of Such Witnesses. 15

III. *Gilbert*'s Foreign-Law Factor Is Inapplicable or Insignificant where Both Fora Share a Common Legal Heritage and Both Would Have To Conduct Choice of Law Analyses and Apply Mixed Local and Foreign Law..... 17

IV. This Case Raises Important and Recurring National Issues that Should Be Resolved by this Court. 18

CONCLUSION..... 19

TABLE OF AUTHORITIES

Pages

Cases

Burt v. *Isthmus Development Corp.*, 218 F.2d 353 (CA5.1955), *cert. denied,* 349 U.S. 922 (1955) 12

Byrne v. *British Broadcasting Corp.*, 132 F. Supp.2d 229 (S.D.N.Y. 2001) 18

Colorado River Water Conservation Distr. v. *United States*, 424 U.S. 800 (1976) 8

Contact Lumber Co. v. *P.T. Moges Shipping Co. Ltd.*, 918 F.2d 1446 (CA9 1990)..... 16

Gschwind v. *Cessna Aircraft Co.*, 161 F.3d 602 (CA10 1998), *cert. denied*, 526 U.S. 1112 (1999)..... 12, 17

Gulf Oil Corp. v. *Gilbert,* 330 U.S. 501 (1947)..... i, 9, 13, 16

Lony v. *E.I. Du Pont de Nemours & Co.*, 935 F.2d 604 (CA3 1991) 13

Mercier v. *Sheraton Int'l, Inc.*, 935 F.2d 419 (CA1 1991) 16

Mercier v. *Sheraton Int'l, Inc.*, 981 F.2d 1345 (CA1 1992), *cert. denied*, 508 U.S. 912 (1993) 12

Piper Aircraft Co. v. *Reyno*, 454 U.S. 235 (1981) 10, 11

Polythane Systems, Inc. v. *Marina Ventures Intern., Ltd.*, 993 F.2d 1201 (CA5 1993), *cert. denied*, 510 U.S. 1116 (1994)..... 16

Reid-Walen v. *Hansen,* 933 F.2d 1390 (CA8 1991) 11, 12, 18

Statutes

28 U.S.C. § 1254(1)..... 2

Treaties

Treaty of Commerce, Oct. 2-14, 1881, U.S.-Serbia, 22 Stat. 963 10

Treaty of Friendship and General Relations, July 3, 1902, U.S.-Spain, 33 Stat. 2105 10

Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, U.S.-Liberia, 54 Stat. 1739 ..... 2, 9

Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, U.S.-Ir., art. VI(1)(c), 1 U.S.T. 785 9

Treaty of Friendship, Commerce, and Consular Rights, Dec. 7, 1927, U.S.-Honduras, 45 Stat. 2618 10

Treaty of Friendship, Commerce, and Consular Rights, June 19, 1928, U.S.-Austria, 47 Stat. 1876 10

Treaty of Friendship, Commerce, and Consular Rights, June 5, 1928, U.S.-Norway, 47 Stat. 2135 10

Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Paraguay, 12 Stat. 1091 10

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The district court's opinion and order dismissing the case on *forum non conveniens* grounds is unreported and is reproduced herein as Appendix B (pages B1-B18). The Second Circuit's opinion affirming the district court's dismissal is published at 329 F.3d 64, and is reproduced herein as Appendix A (pages A1-A18). The Second Circuit's order denying petitioner rehearing and rehearing *en banc* is unpublished, and is reproduced herein as Appendix C (pages C1-C2).

JURISDICTION

The Second Circuit issued its opinion on May 1, 2003, and denied petitioner's requests for rehearing and rehearing *en banc* on August 4, 2003. On October 21, 2003, Justice Ginsburg granted an extension of time to file this petition to and including December 3, 2003. This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Treaty of Friendship, Commerce and Navigation, August 8, 1938, between the United States of America and Liberia, 54 Stat. 1739, Article I of which provides, in relevant part, that the nationals of each party

> shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of rights, and in all degrees of jurisdiction established by law.

STATEMENT OF THE CASE[1]

1. This case involves the dismissal, on *forum non conveniens* grounds, of a suit brought in the Southern District of New York by a Greek-owned Liberian corporation against the Chase Manhattan Bank, a New York banking corporation with its world headquarters and principal place of business in New York City. The suit alleges various acts and omissions by Chase Manhattan – both in New York and abroad – that constitute, *inter alia*, fraud, misrepresentation, and breach of fiduciary duty in connection with Chase's handling and supervision of plaintiff's investments. The suit was dismissed in favor of a forum in London, England.

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[1] Unless otherwise noted, the facts are taken from the opinions below, attached as Appendices A-B.

2. The wrongdoing alleged in this case has numerous connections with respondent's home forum of New York. For example, petitioner's investment relationship with Chase Manhattan Bank was managed by the Hellenic and Maritime Industries Group (the "Hellenic Group") of Chase's Private Bank division in New York. At the relevant times the Hellenic Group was headed from either New York or London, and the activities of that group were supervised by Chase officers at the Private Bank in New York. And from 1996 to 1999 – the investing period central to this case – the Hellenic Group was headed, and Springwell's relationship with Chase was managed, by Stewart Gager, a New York-based Managing Director of Chase's Private Bank. Gager played an active role in managing Springwell's investments with Chase and its interactions with a London-based salesperson, and Gager personally gave investment advice to Springwell on many occasions. Joint Appendix ("JA") in the Second Circuit, at JA349.

The case also has connections with the proposed alternative forum of London. For example, Springwell often dealt with Justin Atkinson, a London-based salesperson at a wholly-owned Chase subsidiary in London. JA57-58, JA826. But notwithstanding some connections with London, as well as with Greece, Moscow, and the Channel Islands, this case's many New York connections were far from incidental.

The investments relevant to this case included emerging-market debt instruments from Mexico, Argentina, and Brazil, and complex Chase-created derivative products based on Russian "GKO" bonds called GKO Linked (S Account) Notes ("GKO Notes" or "Notes").[2] All of the essential transactions

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[2] The GKO Notes were fixed-return derivative investment products payable in U.S. Dollars and issued by a Chase subsidiary in the Channel Islands. The underlying GKO's were purchased by Chase or one of its affiliates, presumably for its own account, and the derivative Notes shifted the risks, and supposedly the rewards, of those bonds to Chase clients such as Springwell. The Notes included forward foreign exchange contracts

regarding the convoluted and complex derivative GKO Notes took place at Chase New York, including: purchase confirmations, summary terms and conditions, and misleading "Risk Disclosure" statements all sent between New York and Greece; payments made by transferring funds to Chase in New York; questions directed to Chase employees in New York; copies of all notices required to be sent to New York; and demand for payment under the Notes only at "the offices of The Chase Manhattan Bank in New York City." JA410, JA739, JA742-96, JA829. The central decisions and transactions concerning financing for Springwell's investments also took place in New York. JA727-28, JA739, JA828.

By 1998, Springwell had a highly leveraged portfolio in which hundreds of millions of dollars were invested in high-risk emerging-market paper. That precarious position into which Chase led Springwell eventually imploded. The Russian government's GKOs were, in essence, a "pyramid" scheme that, in August 1998, collapsed and led to defaults on the GKOs and Chase's derivative GKO Notes. Other emerging market investments in Springwell's portfolio also plummeted in value and defaulted around this time period. Springwell nonetheless was required to pay off the financing for those investments, which it did by a term-loan arrangement negotiated through Chase New York. JA89, JA223, JA801. As a result of those events, Springwell suffered more than $200 million in damages, including losses of more than $87 million on the GKO Notes alone.

Following the collapse, Chase New York made several proposals to Springwell in an attempt to resolve responsibility for the losses, with the negotiations all conducted with key financial and legal personnel at Chase New York. JA430-02,

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with several Russian banks (including Chase's Moscow affiliate) in order to hedge against the risk that the Ruble would be devalued by locking in a fixed rate between Dollars and Rubles.

JA436-42, JA801-04, JA807-08, JA810-23. Those negotiations were unsuccessful.

3. In December 1999, Springwell filed this action in the Southern District of New York against Chase, seeking damages for breach of fiduciary duty, breach of contract, and misrepresentation in connection with Chase's recommendation and sale to Springwell of various highly risky investments that were entirely unsuitable for Springwell's investment objectives.

The essential elements of Springwell's Complaint, JA53-70, are that: Chase misled Springwell by misrepresentation and omission regarding the safety and suitability of the investments it recommended to Springwell; Chase misrepresented and failed to disclose the magnitude and true nature of the risks associated with the GKO Notes and related currency transactions; Chase overreached and abused its fiduciary trust in structuring the GKO Notes in a manner that placed all of the risks on the purchasers but paid to the purchasers only a small portion of the underlying return; Chase senior managers in New York failed to supervise adequately its London salesperson or to monitor and assess adequately Springwell's portfolio; and Chase breached its fiduciary duty to Springwell to maximize Springwell's post-collapse return on its investments.[3]

Chase moved to dismiss based on *forum non conveniens*. After being denied discovery regarding forum issues, JA491, Springwell opposed the motion to dismiss with such evidence as was available to it, and Chase replied.

4. The district court, without having heard oral argument, granted Chase's motion to dismiss. App. B1-B18.

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[3] In its briefing in the Second Circuit, Springwell also alleged continuing post-Comlaint violations of fiduciary duty by Chase New York in its handling the vestiges of Springwell's investments that remained stuck with Chase and stated its intention to add those allegations to the Complaint by amendment. Springwell Br. 12, 26-27; Springwell Reply 11, 25.

The district court held that Springwell, a foreign corporation, was due only "minimum" deference for its selection of Chase's home forum in which to bring suit. App. B17. While the court passingly noted that Springwell was the beneficiary of an access-to-courts treaty between the United States and Liberia – entitling Springwell to the same initial deference as a citizen of the United States – the court nonetheless focused solely on Springwell's foreign residence and its supposed lack of "connections to the United States" in order to find that Springwell's "choice of forum should not be accorded particularly strong deference." App. B10. The district court gave no consideration to defendant Chase's residence in New York when considering the deference due Springwell's choice of a New York forum.

In conducting the *forum non conveniens* balancing, the court ruled that although the private-interest convenience factors failed to demonstrate oppressiveness or vexation to Chase, two public-interest factors – local interest and application of some foreign law – and a limited private-interest concern regarding lack of compulsory process over several witnesses favored dismissal. App. B10-B16.

5. Petitioner appealed and the Second Circuit affirmed. App. A1-A18. Like the district court, the Second Circuit gave virtually no deference to Springwell's choice of forum. In rejecting Springwell's argument that the U.S.-Liberian Treaty granting "freedom of access to the courts" entitled Springwell to substantial deference in its choice of a U.S. forum, the court held that the Treaty "stops well short of granting the nationals of both countries" *equal* access and hence "the Liberian treaty does not afford the plaintiffs' choice of a United States forum the same deference as that afforded the choice of a U.S. citizen." App. A10-A11. The court further discounted any deference potentially due from equal "citizen" status absent U.S. *residence*, arguing that such claimed deference "impermissibly conflates citizenship and convenience, and assigns an artificial weight to citizenship." App. A12.

The court also rejected Springwell's argument that where plaintiff brings suit in *defendant's* home forum, that choice should receive the same presumptive deference as when a plaintiff sues in its own home forum, and that where a home-forum defendant seeks transfer to a forum that is home to *neither* party, defendant should face a higher burden of deference to plaintiff's choice of forum. Springwell Br. 21. The court instead held that while a plaintiff's choice of its own home forum can be assumed to be motivated by convenience, the "choice of the defendant's home forum provides a much less reliable proxy for convenience." App. A13.

Regarding the elements of the *Gilbert* balance itself, the Second Circuit merely endorsed the district court's finding that the sole private interest factor of compulsory process for unwilling witnesses "weighs heavily in favor of dismissal" and held that such finding was not "clearly erroneous." App. A16. In doing so, the court rejected Springwell's contention that because defendant failed to show *any* unwillingness of friendly Chase witnesses to appear for trial in New York, and hence failed to show any need for such compulsory process, the *Gilbert* factor regarding "unwilling" witnesses did not apply at all. Springwell Br. 36-38; Springwell Reply 17-19.

The court also rejected Springwell's argument that given the trial-demeanor basis of the compulsory-process element, the unchallenged availability of video depositions, and England's reliance on written, rather than live, testimony for the case-in-chief, this factor had no significant weight against a New York forum and instead should have weighed in *favor* of a New York forum. Springwell Br. 36-39; Springwell Reply Br. 17-19.

Finally, regarding the public-interest factor involving application of foreign law, the court found that, despite the likely application of *both* New York and English law to various aspects of the case, there was no "abuse of discretion" in the district court's conclusion that "choice of law considerations strongly tipped in favor of litigation in England." App.

A18. In doing so, the court rejected Springwell's arguments that where *both* fora would have to conduct choice of law analyses and apply some foreign law, this factor was a wash, and that application of English law, which shares a common heritage with New York law, was at best a minimal consideration in the *Gilbert* balance. Springwell Br. 53-54, 57; Springwell Reply 26, 29.

Petitioner sought rehearing and rehearing *en banc*, both of which were denied. App. D1.

This petition for certiorari followed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the decision below improperly diminishes deference to a plaintiff's initial choice of forum in a manner that conflicts with the U.S.-Liberian Treaty and other similarly worded bilateral treaties and conflicts with the deference applied in other circuits to a plaintiff's choice of the defendant's home forum. The decision below also misinterprets the *Gilbert* balancing factors relating to compulsory process for "unwilling" witnesses and to application of foreign law, in a manner inconsistent with *Gilbert* itself and with the treatment of those factors in other circuits.

I. THE DENIAL OF DEFERENCE TO PETITIONER'S CHOICE OF RESPONDENT'S HOME FORUM CONFLICTS WITH U.S. TREATY OBLIGATIONS AND WITH THE DECISIONS OF OTHER CIRCUITS.

It is well-established that a federal court with jurisdiction over a case has a solemn obligation to exercise that jurisdiction absent rare and compelling circumstances to the contrary. *Colorado River Water Conservation Distr.* v. *United States*, 424 U.S. 800, 817 (1976). Although jurisdiction may be declined if the chosen forum is unusually inconvenient, dismissal on the grounds of *forum non conveniens* is an infrequent and disfavored outcome. "[U]nless the balance is strongly in favor of the defendant, the plaintiff's choice of

forum should rarely be disturbed." *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508 (1947).

A. The Treaty-Imposed Obligation To Allow Freedom of Access to the Courts Requires Substantial Deference to a Treaty-Beneficiary's Choice of Forum.

The U.S.-Liberian Treaty of Friendship, Commerce, and Navigation provides "freedom of access to the courts" for citizens of the signatories. The Second Circuit's dismissal of that Treaty-guaranteed access as providing something less than equal treatment to U.S. litigants, and as having little effect on *forum non conveniens* analysis, misconstrues and undermines the United States' treaty obligations to Liberia and to numerous other nations having similarly worded treaties with the United States.

The Second Circuit held that the U.S.-Liberian Treaty provides less deference than do other treaties that provide for "national treatment" regarding access to courts. App. A10-A11 (distinguishing, *inter alia*, the U.S.-Ireland Treaty, Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, U.S.-Ir., art. VI(1)(c), 1 U.S.T. 785, 790-91("Nationals and companies of either Party shall be accorded, within the territories of the other Party, national treatment with respect to having access to the courts of justice * * *.")). That holding ignored the plain language of the U.S.-Liberian Treaty, which, if anything, is *broader* than other "national treatment" treaties and provides an unqualified "freedom of access" to the courts of the signatories.

At a minimum, however, the Treaty in this case should be read as providing at least equal access to that granted home-country nationals and the beneficiaries of other treaties having the same core purpose despite any minor evolution in wording. To hold otherwise, as did the court below, relegates treaty beneficiaries to the status of other foreign litigants from countries that have not entered into such bilateral agreements

with the United States, and thus renders such treaty provisions meaningless.[4]

In denigrating the significance of the U.S.-Liberian Treaty, the decision below will have consequences well beyond the parties to this one treaty given that comparable wording appears in various other treaties. *See, e.g.*, Treaty of Friendship, Commerce, and Consular Rights, June 19, 1928, U.S.-Austria, Art. I, 47 Stat. 1876 ("The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other"); Treaty of Friendship, Commerce, and Consular Rights, June 5, 1928, U.S.-Norway, Art. I, 47 Stat. 2135 (same); Treaty of Friendship, Commerce, and Consular Rights, Dec. 7, 1927, U.S.-Honduras, Art. I, 45 Stat. 2618 (same); Treaty of Friendship and General Relations, July 3, 1902, U.S.-Spain, Art. VI, 33 Stat. 2105 ("The citizens or subjects of each of the two High Contracting Parties shall have free access to the Courts of the other"). Similar provisions can be found in the Treaty of Friendship, Commerce, and Navigation, Feb. 4, 1859, U.S.-Paraguay, Art. IX, 12 Stat. 1091, and the Treaty of Commerce, Oct. 2-14, 1881, U.S.-Serbia, Art. IV, 22 Stat. 963.

The decision below thus will affect suits by citizens from any of those countries brought in the United States and suits by U.S. citizens brought in any of those countries.

The Second Circuit's focus on residence rather than on treaty rights and citizenship status, App. A12, was an unwar-

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[4] The Second Circuit's denigration of the Liberian Treaty relative to other supposedly stronger bilateral treaties is particularly inappropriate given that the real parties in interest here are Greek citizens entitled to the benefit of just such a supposedly stronger treaty. *See* Treaty of Friendship, Commerce, and Navigation, Aug. 3, 1951, U.S.-Greece, Art. VI, 5 U.S.T. 1829 (according nationals of either party "national treatment and most-favored-nation treatment with respect to access to the courts of justice"). This Court in *Piper Aircraft Co.* v. *Reyno*, of course, made a point of looking to the real parties in interest rather than the nominal party bringing suit. 454 U.S. 235, 242, 261 (1981).

ranted diminution in the rights and obligations negotiated by the United States and Liberia for their respective citizens and court systems. Withdrawing treaty deference from plaintiffs who are not United States residents reduces the value of the treaties to a virtual nullity, since much of the value of the treaties is that they provide a heightened standard of treatment for United States and foreign beneficiaries of such treaties as compared to citizens of countries that have not entered into such reciprocal relationships with the United States. Many of the persons and companies that can be expected to make use of the treaties are residents of their own countries who engage in international business involving the reciprocal nation. Therefore, denying non-residents favorable treatment when they need to access the courts of the signatory nations disserves both United States and foreign beneficiaries engaged in such business. If citizenship, apart from residence, is given no weight, then there is little difference in the treatment that will be accorded beneficiaries and non-beneficiaries of the treaties.

The United States should not be presumed to have entered into such pointless international obligations. Rather, citizenship itself – and hence treaty provisions benefiting citizens of the signatories – should accord a significant, though not dispositive, boost in deference, even absent residence within the forum.

The Second Circuit's refusal to assign any meaningful weight to citizenship under the Treaty conflicts with this Court's own recognition in *Piper Aircraft Co.* v. *Reyno* that, although it is not determinative of the deference issue, United States "[c]itizens *or* residents deserve somewhat more deference than foreign plaintiffs." 454 U.S. 235, 257 (1981) (emphasis added). It also conflicts with cases from other circuits holding that citizenship itself is important to the degree of deference, separate from a party's residence. *See, e.g.*, *Reid-Walen* v. *Hansen,* 933 F.2d 1390, 1394 (CA8 1991) ("the relevant distinction is whether or not the plaintiff who has se-

lected the federal forum is a United States citizen"); *Burt* v. *Isthmus Development Corp.*, 218 F.2d 353, 357 (CA5) ("courts should require positive evidence of unusually extreme circumstances ... before exercising any such discretion to deny a citizen access to the courts of this country"), *cert. denied,* 349 U.S. 922 (1955).

Given such conflicts, and the substantial damage to U.S. rights and obligations under multiple bilateral treaties, the effect of the U.S.-Liberia Treaty on *forum non conveniens* deference is an important national issue that should be resolved by this Court.

B. Plaintiff's Choice of Defendant's Home Forum Deserves Substantial Deference where the Only Proposed Alternative Is a Forum that Is Home to Neither Party.

The Second Circuit also erred by dismissing plaintiff's choice of *defendant's* home forum and defendant's attempt to transfer to a forum that was home to *neither* party as factors triggering heightened deference. In so doing, the Second Circuit brought itself into conflict with the more deferential approaches of other circuits.

The Tenth Circuit, for example, holds that "a forum resident should have to make a stronger case than others for dismissal based on *forum non conveniens.*" *Gschwind* v. *Cessna Aircraft Co.*, 161 F.3d 602, 609 (CA10 1998), *cert. denied*, 526 U.S. 1112 (1999). The Eighth Circuit likewise finds that "where the forum resident seeks dismissal, this fact should weigh strongly against dismissal." *Reid-Walen,* 933 F.2d at 1395. And the First Circuit recognizes that the "deference accorded the plaintiff's choice of forum is enhanced when the plaintiff has chosen a forum in which the defendant maintains a substantial presence." *Mercier* v. *Sheraton Int'l, Inc.*, 981 F.2d 1345, 1354 (CA1 1992), *cert. denied*, 508 U.S. 912 (1993).

As explained by the Third Circuit, such an attempted transfer *away* from the defendant's home forum is particularly "puzzling in that frequently the *forum non conveniens* issue is raised by a defendant sued away from home who seeks to convince the court that the balance of relevant factors should be tipped against requiring it to defend in a forum far from its home jurisdiction." *Lony* v. *E.I. Du Pont de Nemours & Co.*, 935 F.2d 604, 608 (CA3 1991) (citations omitted). Indeed, in the current case, as in *Lony*, the defendant was headquartered in the forum, was an extremely large employer within the forum, yet sought to move the action against it to a forum thousands of miles away, which the *Lony* court, quoting Alice, found "'curiouser and curiouser.'" *Id.* Indeed, even this Court has found it "strange" when a party objects to suit in its home forum. *Gilbert,* 330 U.S. at 510 (discussing plaintiff's objection to having suit transferred back to plaintiff's home forum).

The decisions of other circuits increasing deference where suit is brought in defendant's home forum are far more faithful to this Court's decision in *Gilbert* and to the principles underlying the doctrine of *forum non conveniens*.

Deference to a choice of *either* party's home forum derives not merely from defendant's amenability to suit at home, but also from the presumed-convenience to *either* party of being in its own home forum and the symmetrical nature of the *Gilbert* balancing test in examining the convenience or the inconvenience of *both* plaintiffs and defendants.

By asking only whether the choice of a defendant's home speaks to plaintiff's convenience, the Second Circuit ignored the very point of the symmetry principle, which is that deference to plaintiff's choice and skepticism of defendant's motion are two sides of the same coin. Suit in defendant's home forum is relevant not because what it says about *plaintiff's* motivations – though in this case New York was plainly more convenient than plaintiff's home fora of Liberia or Greece – but because it should be presumed convenient to the defen-

dant and casts presumptive doubt upon the *defendant's* motivations in seeking transfer to a third forum not home to *either* party. Deference to plaintiff and skepticism of defendant slide along the same scale and should equally raise the bar for a *forum non conveniens* motion.

In this case there was no dispute that plaintiff's home fora of Liberia or Greece would have been more inconvenient for *all* parties, including plaintiff, given that Liberia had virtually no connection to the case and Greece would have involved translation problems for the mostly English-language documents and witnesses. Where a foreign plaintiff such as Springwell is pressed by practicality and common sense into choosing between two or more non-home fora, its choice should not be denied deference merely because it has rejected suit in its home forum for good and sufficient reasons. Far from indicating a tactical decision to forgo convenience in favor of some inappropriate objective, the decision in these circumstances shows a serious consideration of the conveniences notwithstanding such other tactical advantages Springwell might have had from suing at home. Unlike many situations where a plaintiff seeks a U.S. forum instead of its home forum, here, where plaintiff's "home" forum is demonstrably less appropriate for the case, the most reasonable presumption is that plaintiff has selected the next most convenient forum in which to bring the suit. Indeed, even Chase seems to recognize that Springwell's "home" fora are not, in this instance, presumptively convenient locations: Chase has *not* suggested transfer to Greece or Liberia.

Conversely, Chase's effort to transfer this case *away* from its forum of residence to a third-party forum must be viewed with a skepticism equal and opposite to the deference given a plaintiff suing in its home forum. Such a move on its face suggests that the motion is not being made for convenience, but rather for tactical advantage. Unlike Springwell's obvious and valid reasons for eschewing its home fora of either Liberia or Greece, there are no similarly facial deficiencies

with New York as a forum. And, with numerous documents and witnesses in *both* fora, there is no presumptive reason to assume that England will serve the conveniences of the parties better than New York.

By ignoring the choice of defendant's home forum as a factor enhancing deference, the Second Circuit has inverted the ordinary deference to plaintiff's choice of forum directed by *Gilbert*. Had Chase been the party to bring suit in New York, it plainly would have received substantial deference. But in seeking to *leave* New York it faces no comparably significant hurdle. The Second Circuit thus has shifted the prerogative of choosing a forum to the defendant, in conflict with the very limited nature of *forum non conveniens* principles and the decisions of other courts. This Court should grant certiorari to resolve the conflict and to reestablish the proper allocation of deference in forum analysis.

II. *GILBERT*'S COMPULSORY-PROCESS FACTOR IS INAPPLICABLE ABSENT A SHOWING THAT WITNESSES ARE UNWILLING TO APPEAR IN PLAINTIFF'S CHOSEN FORUM OR THAT A JURY WOULD BE UNABLE TO ASSESS THE DEMEANOR OF SUCH WITNESSES.

In addition to erring regarding the deference that permeates *forum non conveniens* analysis, the Second Circuit also misconstrued the very nature of some of the specific interests in the *Gilbert* balance. The Second Circuit's endorsement of the finding that the compulsory process factor "weighs heavily in favor of dismissal," even absent any indication of "unwilling" witnesses likewise was error and creates a conflict with other circuits. In this case there was not even an allegation – much less evidence – that witnesses friendly to the defendant would be unwilling to appear in New York. This case thus presents an ideal vehicle for deciding whether some showing of "unwillingness" to appear in the initial forum is a prerequisite to the application of that *Gilbert* factor.

In contrast to the decision below, both this Court and other circuits have emphasized the "unwilling" witness aspect of that *Gilbert* factor. *See, e.g.*, *Gilbert,* 330 U.S. at 508 ("availability of compulsory process for attendance of *unwilling*, and the cost of obtaining attendance of *willing*, witnesses") (emphasis added); *Polythane Systems, Inc.* v. *Marina Ventures Intern., Ltd.*, 993 F.2d 1201, 1207 (CA5 1993) ("no showing of necessary witnesses residing in Maryland who would be *unable* to attend the trial in Texas"), *cert. denied*, 510 U.S. 1116 (1994) (emphasis added); *Contact Lumber Co.* v. *P.T. Moges Shipping Co. Ltd.*, 918 F.2d 1446, 1451 (CA9 1990) ("compulsory process to obtain the attendance of *hostile* witnesses") (emphasis added); *see also*, *Mercier* v. *Sheraton Int'l, Inc.*, 935 F.2d 419, 428 (CA1 1991) (agreeing with district court's determination that *Gilbert* factors relating to witnesses were "about equal" based in part on district court's rejection of compulsory process factor because defendant "had failed to establish that [its foreign] witnesses would be unwilling to come to the United States or to provide depositions on a voluntary basis").

The decision below thus conflicts with those decisions and raises a straight-forward legal question regarding the nature of *Gilbert*'s compulsory-process factor. If some showing of "unwilling[ness]" is required before that factor can be weighed in favor of dismissal, then the courts below erred as a matter of law in weighing it "heavily" in this case.[5] And

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[5] The error of the Second Circuit's decision was further compounded by the fact that England, as a forum, was at an intrinsic disadvantage regarding witness demeanor regardless of which witnesses could or could not be compelled to appear there. While a New York court could assess witness demeanor – either live or on tape – at all phases of the trial, Chase's own expert suggested that in England virtually all "evidence in chief" or "direct evidence" from witnesses is introduced in the form of *written* statements. JA263. New York thus would afford greater opportunity to assess witness demeanor *regardless* of where the witnesses were located and thus this factor actually *favors* a New York forum.

because the compulsory-process factor has substantial potential to influence virtually every case where there is even a colorable alternate forum, this Court's time would be well spent in resolving the conflict and clarifying the nature of that *Gilbert* factor.

III. *GILBERT*'S FOREIGN-LAW FACTOR IS INAPPLICABLE OR INSIGNIFICANT WHERE BOTH FORA SHARE A COMMON LEGAL HERITAGE AND BOTH WOULD HAVE TO CONDUCT CHOICE OF LAW ANALYSES AND APPLY MIXED LOCAL AND FOREIGN LAW.

Finally, the Second Circuit erred in its treatment of *Gilbert*'s application-of-foreign-law factor, finding the need to apply English law as well as New York law was a substantial factor favoring dismissal. App. A18. There was no dispute in this case, however, that both English and New York Courts would be required to apply a mixture of English and New York law to this case. *Compare* Springwell Br. 53-55 *with* Chase Br. 42-44. Springwell had contended that this factor was therefore a wash regardless of the greater or lesser proportions of New York or English law to be applied. *Compare* Springwell Br. 53-55 *with* Chase Br. 44. In assessing the relative convenience of competing fora, shifting the burden of choice of law analysis and application of non-local law from a U.S. court to a foreign forum does not enhance the convenience of the case as a whole, and U.S. courts should not seek to enhance their own convenience at the expense of their foreign colleagues.

Furthermore, as other courts have recognized, the need to apply foreign law is not a sufficient basis to dismiss a case not otherwise substantially inconvenient. *See, e.g., Gschwind*, 161 F.3d at 609 (unfamiliarity with alternative forum's law not dispositive). Indeed, the relevance of this factor is particularly limited where the "foreign" law – in this case English law – shares familiar historical roots with U.S. law. *See Byrne* v. *British Broadcasting Corp.*, 132 F. Supp.2d 229, 238

(S.D.N.Y. 2001) ("Courts in either country would have to apply the law of the other, and the application of the law of another English common law jurisdiction 'does not impose a significant burden on this Court.'") (citation omitted); *cf. Reid-Walen*, 933 F.2d at 1401 (Jamaican substantive law descended from Great Britain, contained concepts akin to American law, legal matters were not complex, and no language barrier to understanding of Jamaican law).

IV. THIS CASE RAISES IMPORTANT AND RECURRING NATIONAL ISSUES THAT SHOULD BE RESOLVED BY THIS COURT.

Given the ever-increasing internationalization of commerce, disputes between United States and foreign business entities will undoubtedly grow apace and can be expected to have connections with multiple fora. Where such international commerce is mediated by treaties between the United States and selective trading partners, courts should be especially reluctant to impose roadblocks to interactions between such countries. *Forum non conveniens* dismissals can be just such roadblocks unless used sparingly and with due regard for a foreign treaty beneficiary's free access rights to the judicial system. Used too casually, as it was in this case, it can have a significant adverse impact on the predictable resolution of international business disputes.

Overly aggressive application of the *forum non conveniens* doctrine in the Second Circuit is particularly troubling given that New York is an international financial center and home to many companies that do business throughout the world under the guidance and control of their corporate headquarters. Allowing such companies more readily to abandon their home forum whenever their dealings touch upon multiple fora will have a widespread impact and thus presents an important issue meriting the attention of this Court. And given the conflict among the circuits regarding the various questions raised in this petition, a grant of certiorari will serve

the added function of restoring some uniformity of approach to *forum non conveniens* analysis that has not received substantial attention from this Court in nearly a generation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ERIK S. JAFFE
Counsel of record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Petitioner

Dated: December 3, 2003

APPENDIX A

329 F.3d 64

United States Court of Appeals,
Second Circuit.

POLLUX HOLDING LTD., Plaintiff-Appellant,

v.

THE CHASE MANHATTAN BANK, Defendant-Appellee.

Springwell Navigation Corporation, Plaintiff-Appellant,

v.

The Chase Manhattan Bank, Defendant-Appellee.

No. 01-7488, 01-7492.

Argued Oct. 7, 2002.

Decided: May 1, 2003.

Before: WALKER, Chief Judge, CARDAMONE, and STRAUB, Circuit Judges.

CARDAMONE, Circuit Judge.

On this appeal we revisit the doctrine of *forum non conveniens.* That doctrine affords a trial court discretion in a case over which it has jurisdiction to decline to exercise it, whenever it appears that such case may be more appropriately tried in another forum, either for the convenience of the parties or to serve the ends of justice. The focus of any *forum non conveniens* inquiry, as the term itself suggests, is to ensure that the place where a trial is held is convenient, that is, that the forum fits the needs and is suitable to the circumstances of the case.

Plaintiff Pollux Holding Ltd. (Pollux) and plaintiff Springwell Navigation Corporation (Springwell) (collectively plaintiffs or appellants), are Liberian corporations that serve as personal investment vehicles for wealthy Greek individuals. Each filed a separate complaint against The Chase Manhattan Bank (Chase or bank) in the United States District Court for the Southern District of New York in December 1999 before Judge Kimba M. Wood. The complaints allege numerous causes of action--including negligent misrepresentation, fraud, breach of contract, breach of fiduciary duty, negligence, negligent supervision, and violations of English statutory law--all of which are connected to losses stemming from plaintiffs' investments in derivative securities sold by Chase. Judge Wood granted defendant Chase's motion to dismiss both complaints on the grounds of *forum non conveniens,* concluding that England was a more appropriate forum. Plaintiffs filed timely appeals that we heard in tandem.

BACKGROUND

A. *The Parties*

Pollux and Springwell are both organized under the laws of Liberia and each maintains its principal place of business in Greece. Both plaintiffs are personal investment companies serving wealthy Greek nationals engaged in the shipping business; Pollux for Diamantis Diamantides, and Springwell for Adam and Spiros Polemis.

Chase is a New York banking corporation headquartered in New York City, but with numerous overseas branches through which it conducts business. One such branch is located in London (Chase London). Chase is also affiliated with a number of banking companies including: Chase Investment Bank Limited (Chase Limited), a United Kingdom (U.K.) affiliate engaged in emerging market sales; Chase Manhattan International Limited (Chase International Limited), also a U.K. affiliate that took over managing emerging markets-based trading from Chase Limited in 1993; Chase

Manhattan Securities (C.I.) Limited (Chase Securities), a Jersey, Channel Islands affiliate; and Chase Manhattan Bank International (Chase International), a bank organized under the laws of Russia. Chase also operates Private Bank, headquartered in New York, with a branch in London.

Both Diamantides and the Polemises have been banking with Chase for many years. In 1990 Diamantides established a relationship with Chase's Private Bank in London. Diamantides also opened an account with Chase London. The Polemis family, which has been in the shipping business for more than 100 years, has been a client of Chase's Global Shipping Group for almost 50 years. When Springwell was established by Adam and Spiros Polemis in 1986, it also established a banking relationship with Chase London. The Polemises also have a relationship with Chase's Private Bank in London that began in the late 1980s.

In the early 1990s, plaintiffs began to invest in emerging market securities. These emerging market investment products were sold to them by Justin Atkinson, a London-based salesperson who was employed first at Chase Limited and, later, at Chase International Limited. Plaintiffs initially focused on Latin American investments, but subsequently expanded their portfolio to include investments in Russian securities.

B. *The Notes*

In 1996 Chase International Limited developed a complex derivative instrument (Notes) based on Gosudarstvenniye Kratkosrochniye Beskuponniye Obligatsii (GKOs), short-term, zero coupon, rouble denominated bonds issued by the Russian Ministry of Finance. The Notes, which were issued by defendant's affiliate Chase Securities, were linked to the performance of a particular issue of GKOs and incorporated forward foreign exchange contracts that hedged against devaluation of the rouble. Plaintiffs allege these GKOs were a pyramid scheme where the funds from the sale of new Notes

were used to redeem those that matured. Chase Securities did not purchase the underlying GKOs itself; instead, investments in GKOs were made by Chase International Limited which had a special account with Chase International and other Russian banks that allowed it to purchase GKOs as a foreign investor.

Pollux purchased 17 Notes between April 1997 and April 1998 and Springwell purchased 42 Notes between April 1996 and July 1998. Initially plaintiffs purchased the Notes outright, but later financed 60 to 70 percent of the purchase price--including all of the Notes at issue in this litigation--through Chase London. In connection with this financing plaintiffs executed repurchase agreements, under the terms of which Pollux and Springwell bought the Notes, but immediately resold them to Chase London. The agreements further provided that plaintiffs would repurchase the Notes at maturity for the same price paid for them by Chase London, plus a finance charge. After purchasing the Notes in London, plaintiffs transferred the purchase funds to Chase Securities' account at Chase in New York. The purchase confirmations and related documentation for the Notes were generated by the New York bank and New York officials were involved in various aspects of the sales of the Notes.

Both the Notes themselves and the repurchase agreements contain language relevant to issues of choice of law and jurisdiction. The Notes elect both English law and exclusive English jurisdiction, stating

> This Note shall be governed by, and construed and interpreted in accordance with, the laws of England. Any legal action or proceeding with respect to this Note ... may be instituted exclusively in the English courts and, by execution and delivery of this Note, the parties hereto irrevocably submit to the exclusive jurisdiction of such court in any such action or proceeding ...

The confirmation documents generated for each Note contain a summary "terms and conditions" sheet that specifies English law as governing law, but does not address forum selection. The repurchase agreements designate English law as controlling and provide for the parties' consent to submit to English courts' jurisdiction, but not to the exclusion of courts "of any other country of competent jurisdiction."

Plaintiffs' initial investments in the Notes were profitable, yielding returns of 11 to 14 percent for Pollux and, 15 percent on average, for Springwell. In August 1998 the GKO market collapsed because the Russian government defaulted on its internal debt, devalued the rouble, and restricted the exchange of roubles into United States dollars. Pollux's losses on the devalued Notes exceed $40 million; Springwell lost almost $88 million. Following this failure, defendant attempted to negotiate a restructuring of the transactions and a settlement with plaintiffs through various personal meetings in London, and through facsimile messages and telephone conversations.

C. *Prior Legal Proceedings*

When these efforts proved unsuccessful, plaintiffs on December 7, 1999 filed complaints against Chase. Their claims fall into two categories: (1) allegations and causes of action involving the malfeasance of the bank and its agents in recommending and selling the Notes, and (2) the bank's alleged failure to manage the Notes and related hedge contracts, after the collapse, in a manner designed to minimize plaintiffs' losses. Plaintiffs seek damages, declaratory relief, an accounting and rescission of the repurchase agreements.

Defendant moved to dismiss on the grounds of *forum non conveniens* asserting that England is a more convenient forum for this litigation. Plaintiffs, in response, moved for discovery on issues related to defendant's motion to dismiss, but that motion was denied. In a subsequent judgment entered on April 5, 2001, the district court granted defendant's motion to

dismiss both complaints on the grounds of *forum non conveniens.*

On appeal plaintiffs urge that the district court erred by not giving their choice of forum sufficient deference, and by improperly weighing the private and public interest factors that are typically considered in *forum non conveniens* cases. Inasmuch as plaintiffs have misconstrued our recent *forum non conveniens* decisions, and have failed to identify any clear error in the trial court's balancing of the various convenience factors, we affirm.

DISCUSSION

I Standard of Review

A district court's decision to dismiss by reason of *forum non conveniens* is confided to the sound discretion of the district court, to which substantial deference is given. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 257, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). Such a decision may be overturned only when we believe that the trial court has clearly abused its discretion. *See Scottish Air Int'l, Inc. v. British Caledonian Group, PLC,* 81 F.3d 1224, 1232 (2d Cir.1996). Discretion is abused in the context of *forum non conveniens* when a decision (1) rests either on an error of law or on a clearly erroneous finding of fact, or (2) cannot be located within the range of permissible decisions, *see Zervos v. Verizon N.Y., Inc.,* 252 F.3d 163, 169 (2d Cir.2001), or (3) fails to consider all the relevant factors or unreasonably balances those factors. *See Piper Aircraft,* 454 U.S. at 257, 102 S.Ct. 252.

An evaluation of a motion to dismiss on the grounds of *forum non conveniens* proceeds in several stages. As comprehensively explained in *Iragorri v. United Technologies Corp.,* 274 F.3d 65 (2d Cir.2001) (en banc), the "first level of inquiry" pertains to "determining whether the plaintiff's choice [of forum] is entitled to more or less deference." *Id.* at 73. A determination of what degree of deference is owed a plaintiff's choice of forum does not dispose of a *forum non*

conveniens motion, however, because even after determining what deference to accord the plaintiff's choice, a district court still must conduct the analysis set out in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947). *See Iragorri,* 274 F.3d at 73. Thus, the next level of inquiry requires a court under *Gilbert* to determine whether an adequate alternative forum exists. When such is the case the court must go to the third step and balance factors of private and public interest to decide, based on weighing the relative hardships involved, whether the case should be adjudicated in the plaintiff's chosen forum or in the alternative forum suggested by the defendant. *Gilbert,* 330 U.S. at 507-09, 67 S.Ct. 839.

II Deference to Plaintiff's Choice of Forum

Appellants aver that Judge Wood erred by affording their choice of forum too little deference and by granting Chase's motion to dismiss their complaints on *forum non conveniens* grounds. They assert the trial court committed errors of law by (1) applying an incorrect standard for deference; (2) underestimating the import of United States treaties with Liberia and Greece; and (3) failing to credit plaintiffs for initiating suit in New York, defendant Chase's "home forum." We take up each of these arguments in turn.

A. *Standard Used*

It is familiar law that a plaintiff's choice of forum is entitled to substantial deference. As explained in *Iragorri,* when reviewing a motion to dismiss for *forum non conveniens* there is an assumption that the plaintiff's choice of forum will stand unless the defendant can demonstrate that reasons exist to afford it less deference. 274 F.3d at 70-71. In fact, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gilbert,* 330 U.S. at 508, 67 S.Ct. 839.

Nonetheless, circumstances may alter the degree of deference given a plaintiff's forum choice. For example, when a plaintiff sues in his home forum, that choice is generally entitled to great deference, *Koster v.(Am.) Lumbermens Mut. Cas. Co.,* 330 U.S. 518, 524, 67 S.Ct. 828, 91 L.Ed. 1067 (1947), because it is presumed to be convenient. *See Piper Aircraft,* 454 U.S. at 255-56, 102 S.Ct. 252. In contrast, when a foreign plaintiff sues in a United States forum such choice is entitled to less deference because one may not easily presume that choice is convenient. *Id.* at 256, 102 S.Ct. 252. In such circumstances, it is more likely that forum- shopping for a higher damage award or for some other litigation advantage was the motivation for plaintiff's selection. Even absent those forum-shopping considerations, there still is no reason to assume a U.S. forum is convenient for a foreign plaintiff's suit. As *Iragorri* sought to make clear, the degree of deference assigned to plaintiff's choice depends on the specific facts of the case and may be viewed as operating along a "sliding scale"

> The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice.... [T]he greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice and the more it appears that considerations of convenience favor the conduct of the lawsuit in the United States, the more difficult it will be for the defendant to gain dismissal for *forum non conveniens.*

274 F.3d at 71-72. Absent proof that plaintiff's choice of a U.S. forum was motivated by forum-shopping reasons, factors relating to convenience or expense generally weigh heavily in favor of the plaintiff's choice.

Although at the time of its decision the district court did not have the benefit of our *Iragorri* decision, its analysis on the proper degree of deference to be afforded plaintiffs'

choice of forum is consistent with the standards set out in that case. Judge Wood began her deference analysis by noting that she must give deference to the plaintiff's choice of forum and that the appropriate level of deference depended on the plaintiffs' relationship with the Southern District of New York. She recognized that a choice of home forum by an American citizen is given substantial deference, while a foreign plaintiff's choice of a United States forum typically is given less deference.

Applying these standards to appellants' choice, the district court assumed, arguendo, that because of a treaty with Liberia granting access to United States courts, plaintiffs' choice of a United States forum was entitled to the same deference as that of United States citizens. Yet, because the level of deference given to a plaintiff's choice of forum depends on the *bona fide* connection the plaintiff has with that forum, *see DiRienzo v. Philip Servs. Corp.,* 294 F.3d 21, 28 (2d Cir.2002), the district court noted that plaintiffs are not residents of the United States and have no connections--other than wire transfers, faxes and the involvement of Chase officials in the sales of the GKO Notes--with the Southern District of New York. Accordingly, it ruled that their choice of forum was not entitled to particularly strong deference. In other words, it was given a lesser degree of deference. An analogy may give that notion more definition: were plaintiffs to have claimed a family relationship with their chosen forum of New York, it could not be said--in light of the wire transfers, faxes and involvement in the sale of Notes there-- that there is no relationship at all. But the faint family relationship plaintiffs have to the Southern District of New York in the present case is akin to that of a distant cousin who enjoys only a lesser degree of family relationship.

B. *Treaty Obligations*

In contesting the *forum non conveniens* dismissal of their suit, appellants make much of treaty obligations between the United States and Greece and the United States and Liberia,

granting to the nationals of each of those countries reciprocal free access to the courts of the other. *See* Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, U.S.-Greece, 5 U.S.T. 1829; Treaty of Friendship, Commerce, and Navigation, Aug. 8, 1938, U.S.- Liber., 54 Stat. 1739. These treaties, plaintiffs insist, entitle their choice of forum to the same deference as the deference afforded to a U.S. citizen's choice to bring suit in his or her home forum. Although plaintiffs correctly assert that a *forum non conveniens* analysis must take into account relevant treaty obligations, *see Iragorri,* 274 F.3d at 69 n. 2, their arguments miscomprehend the treaties at issue and our prior relevant decisions.

As an initial matter, the district court found and we agree that, because the two named plaintiffs in this case are Liberian corporations, any reference to a treaty between Greece and the United States is irrelevant. We are aware that appellants are owned by Greek nationals, but since plaintiffs are suing as corporations and not in an individual capacity, the United States treaty with Greece has no application.

With respect to the United States treaty with Liberia, the treaty merely grants the citizens of each country "freedom of access" to the courts of the other country. Treaty of Friendship, Commerce, and Navigation, Aug. 8, 1938, U.S.-Liber., art. I, 54 Stat. 1739, 1740 ("The nationals of each [country] shall enjoy freedom of access to the courts of justice of the other ... in all degrees of jurisdiction established by law."). The treaty stops well short of granting the nationals of both countries "access to each country's courts on terms no less favorable than those applicable to nationals of the court's country." *See Farmanfarmaian v. Gulf Oil Corp.,* 588 F.2d 880, 882 (2d Cir.1978). As we have noted before, "[h]istory and practice ... teach that a principle of equal access must be explicitly adopted." *Murray v. British Broad. Corp.,* 81 F.3d 287, 291 (2d Cir.1996).

Further, in prior *forum non conveniens* cases where we have required that a foreign plaintiff be treated on terms no

less favorable than those applicable to U.S. nationals, the foreign plaintiff was a beneficiary of a treaty with an explicit provision providing national access or treatment. *See Blanco v. Banco Indus. De Venezuela, S.A.,* 997 F.2d 974, 981 (2d Cir.1993) (acknowledging a treaty with Venezuela that "accords its nationals access to our courts equivalent to that provided American citizens") (citing Treaty of Peace, Friendship, Navigation and Commerce, Jan. 20, 1836, U.S.-Venez., art. 13, 8 Stat. 466, 472); *Irish Nat'l Ins. Co., Ltd., v. Aer Lingus Teoranta,* 739 F.2d 90, 91-92 (2d Cir.1984) ("Under the terms of a separate treaty between the United States and Ireland, appellant was entitled to 'national treatment with respect to ... having access to the courts of justice.' ") (quoting Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, U.S.-Ir., art. VI(1)(c), 1 U.S.T. 785, 790-91); *Farmanfarmaian,* 588 F.2d at 882 (citing Treaty of Amity, Economic Relations, and Consular Rights, Aug. 15, 1955, U.S.-Iran, 8 U.S.T. 899).

Because "freedom of access" cannot be taken to mean "national access," the Liberian treaty does not afford the plaintiffs' choice of a United States forum the same deference as that afforded the choice of a U.S. citizen. Instead, Pollux and Springwell's choice of forum only merits the lesser degree of deference typically afforded foreign plaintiffs. This rule is not intended to create difficulties for foreign plaintiffs, but is based instead on realistic doubts about the ultimate convenience of a foreign plaintiff's choice to litigate in the United States. *See Piper Aircraft,* 454 U.S. at 255-56, 102 S.Ct. 252; *Murray,* 81 F.3d at 290.

Even assuming that, by treaty, plaintiffs were entitled to access American courts on the same terms as American citizens (an assumption made by the district court to the plaintiffs' benefit), our case law does not support plaintiffs' assertion that such a treaty would require that their choice of forum be afforded the same deference afforded to a U.S. citizen bringing suit in his or her home forum. Such a proposition

impermissibly conflates citizenship and convenience, and assigns an artificial weight to citizenship.

A court considering a motion for dismissal on the grounds of *forum non conveniens* does not assign "talismanic significance to the citizenship or residence of the parties," *see Alcoa S.S. Co., Inc. v. M/V Nordic Regent,* 654 F.2d 147, 154 (2d Cir.1980) (en banc), and there is no inflexible rule that protects U.S. citizen or resident plaintiffs from having their causes dismissed for *forum non conveniens. See Wiwa v. Royal Dutch Petroleum Co.,* 226 F.3d 88, 102 (2d Cir.2000). As we plainly stated in *Iragorri,* "while [a] plaintiff's citizenship and residence can serve as a proxy for, or indication of, convenience, neither the plaintiff's citizenship nor residence ... necessarily controls the outcome." 274 F.3d at 74. Significantly, we suggested that the selection of a U.S. forum by a U.S. citizen living abroad would be entitled to less deference than the choice of the same forum by a citizen residing in the forum because with respect to the expatriate U.S. citizen "it would be less reasonable to assume the choice of forum is based on convenience." *Id.* at 73 n. 5.

Consistent with this logic, appellants cannot successfully lay claim to the deference owed an American citizen or resident suing in her home forum. Plaintiffs are only entitled, at best, to the lesser deference afforded a U.S. citizen living abroad who sues in a U.S. forum. This was precisely the level of deference the district court assigned plaintiffs' choice of forum: it gave them the same initial deference in choosing a United States court as it would a United States citizen discounted by the fact that plaintiffs are not residents of the United States.

C. *Suit in Defendant's Home Forum*

Pollux and Springwell challenge the district court's deference analysis on a final ground, declaring that their choice of the Southern District of New York is due particular deference because it is defendant Chase's home forum. Springwell

maintains, citing *Iragorri,* that when a plaintiff sues in the defendant's home forum, that choice should be deemed reasonable and receive the same presumptive deference as that given when a resident plaintiff sues in its own home forum. In its attempt to create a *per se* rule favoring litigation in the defendant's home forum, Springwell misconstrues *Iragorri.*

In *Iragorri* we addressed the following question: "what degree of deference should the district court accord to a United States plaintiff's choice of a United States forum where that forum is different from the one in which the plaintiff resides." *Id.* at 69. In answering this question we said that "[i]t is not a correct understanding of the rule to accord deference only when the suit is brought in the plaintiff's home district." *Id.* at 73. We observed that "[o]ne of the factors that necessarily affects a plaintiff's choice of forum is the need to sue in a place where the defendant is amenable to suit" and that "[w]here a U.S. resident leaves her home district to sue the defendant where the defendant has established itself and is thus amenable to suit, this would not ordinarily indicate a choice motivated by desire to impose tactical disadvantage on the defendant." *Id.* at 72-73.

Although a plaintiff's choice of forum will not necessarily merit less deference because plaintiff is suing outside her home forum, such a choice made to obtain jurisdiction over defendant is an instance where substantial deference would still be generally appropriate. But, it is an untenable leap of logic to jump from that holding to the blanket assertion that a plaintiff's choice of forum deserves presumptive deference simply because the chosen forum is defendant's home forum. It is reasonable for a court to assume that a plaintiff's choice of her own home forum is motivated by convenience. The plaintiff's choice of the defendant's home forum provides a much less reliable proxy for convenience. Bearing in mind that litigants rarely are concerned with promoting their adversary's convenience at their own expense, a plaintiff's choice of the defendant's home forum over other fora where defen-

dant is amenable to suit and to which the plaintiff and the circumstances of the case are much more closely connected suggests the possibility that plaintiff's choice was made for reasons of trial strategy. Accordingly, a plaintiff's choice to initiate suit in the defendant's home forum--as opposed to any other where the defendant is also amenable to suit--only merits its heightened deference to the extent that the plaintiff and the case possess *bona fide* connections to, and convenience factors favor, that forum.

The notion that underlies our refusal automatically to grant any particular deference to a plaintiff's choice of the defendant's home forum is illustrated in this case. The fact that New York is Chase's home jurisdiction does not show that plaintiffs' decision to bring suit here was driven by considerations of convenience. For purposes of our deference analysis it is much more critical, as already noted, that other than the earlier mentioned wire transfers, faxes and the sale of the GKO Notes, plaintiffs offered no proof that they have connections to the United States and failed to demonstrate that New York is convenient for them. It is also a key point that the district court found that plaintiffs' declarations make it clear that their interactions with Chase were centered in London. Plaintiffs' decision to initiate suit in Chase's home forum notwithstanding, the plaintiffs and their case have only a faint connection to the United States and thus their choice of forum does not merit the same substantial deference afforded to a suit initiated in a plaintiff's home forum.

III *Gilbert* Analysis

After making an initial assessment of the deference due the plaintiff's choice of forum, a district court must next determine whether an adequate alternative forum exists and, if so, then balance private and public interest factors to ascertain whether the case should be adjudicated in plaintiff's chosen forum or in the alternative forum proposed by defendant. *See Gilbert,* 330 U.S. at 507-09, 67 S.Ct. 839. As our analysis below indicates, the district court properly determined Eng-

land to be an adequate alternative forum and properly weighed the prescribed private and public interest factors that supported its decision to dismiss the complaints.

The issue of whether or not the bank's proposed alternative forum of England is adequate need not detain us long. An alternative forum is adequate if the defendants are amenable to service of process there, and if it permits litigation of the subject matter of the dispute. *Piper Aircraft,* 454 U.S. at 254 n. 22, 102 S.Ct. 252; *Capital Currency Exch., N.V. v. Nat'l Westminster Bank PLC,* 155 F.3d 603, 609 (2d Cir.1998). Chase agreed in the trial court to submit to the jurisdiction of England as a condition of dismissal and, with several of appellants' claims asserted under English statutory law, there can be no doubt that England permits litigation to resolve commercial disputes of the type presented in this case. Since plaintiffs have not asserted that English courts are in any way inadequate and because we have expressed high regard for those courts' fairness and commitment to the rule of law, *see Wiwa,* 226 F.3d at 101, it certainly cannot be said that it was an abuse of discretion to hold that England was an adequate alternative forum.

The next issue under *Gilbert* is to weigh defendant's hardships if jurisdiction is retained in the forum of plaintiff's choice against plaintiff's hardships if the motion to dismiss is granted and plaintiff is forced to begin suit anew in a different forum. *Gilbert* sets out private and public interest factors to be considered when balancing the relative hardships and conveniences. The private interest factors relevant here include (1) the relative ease of access to sources of proof, (2) availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses, and (3) all other practical problems that make trial of a case easy, expeditious and inexpensive. *Gilbert,* 330 U.S. at 508, 67 S.Ct. 839.

In analyzing the private interest factors the district court found that only one, the availability of compulsory process,

favored one forum over the other in the case at hand. With respect to the ease of access to sources of proof, for example, the trial court observed that there were undoubtedly relevant documents in both New York and London but that, in any event, technological advances have minimized the burden of transporting documentary evidence. Similarly, with respect to the cost of obtaining witnesses, the court observed that most of the witnesses likely to appear at trial reside in England, but found that neither Chase nor appellants offered evidence that the cost of obtaining witnesses in either forum would be prohibitive. Although Judge Wood was not persuaded that it would be exorbitantly expensive to obtain witnesses in either forum, she did observe that Chase identified several key witnesses whose testimony can be compelled only in England while plaintiffs have not demonstrated that any material witnesses would be unavailable there. Thus, she ruled that this factor weighs heavily in favor of dismissal. Our review of that record does not show any private interest factors' findings to be clearly erroneous.

Appellants do little to contest these findings other than to suggest that, had the district court granted their motions for discovery on forum- related issues, they would have been able to offer more evidence tilting the consideration of private interest factors in their favor. Pollux, in fact, challenges the district court's denial of its forum-related discovery motion, arguing on appeal that the trial court abused its discretion. Plaintiffs have not articulated any persuasive reason for us to believe that the sought after discovery would have yielded additional support for their position. Accordingly, we find no abuse of discretion in the district court's decision to deny plaintiffs' motions and to decide the *forum non conveniens* motion based on the existing record.

Turning to the public interest factors, the Supreme Court has explained

> Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts

> when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.

Gilbert, 330 U.S. at 508-09, 67 S.Ct. 839.

Although several of the public interest factors were not found to favor adjudication in either New York or London, those factors that were found to weigh in favor of a particular forum weighed in favor of the latter. For instance, the trial court found London has a stronger local interest in the dispute. Since the Notes were purchased by plaintiffs in England the district court reasoned that England has a greater interest in regulating investment activity that occurs there, citing the plaintiffs' invocation of English securities law in their complaints as underscoring the point. The trial court gave two additional reasons why England possesses the stronger local interest: it stated that the alleged fraud and misrepresentations primarily occurred there, and that plaintiffs' allegations of breach of contract and breach of fiduciary duty arise out of contracts entered into in London. In contrast, Judge Wood was not persuaded that New York's generalized interest in overseeing the bank, which is headquartered in New York, created any strong local interest. With small local interest in the dispute, it would be burdensome for a New York jury to hear and decide this case.

Even more than the local interest or jury burden factors, Judge Wood found that choice of law considerations favor adjudication in England. Given that most of the relevant conduct occurred in England, English law would apply to the preponderance of plaintiffs' tort claims. Because the financing agreements relating to the Notes contained choice of law provisions electing English law, English law would likely apply to all of the plaintiffs' contractual claims as well. And, English law would obviously apply to plaintiffs' claims initiated pursuant to English securities law. The only claims the district court considered likely to be construed under New York law are the plaintiffs' negligent supervision claims and conversion claims. Yet, owing to the fact that the overwhelming majority of plaintiffs' claims necessitate the application of English law, the trial court concluded that choice of law considerations strongly tipped in favor of litigation in England.

Although appellants maintain that the findings with respect to the public interest factors are erroneous and that these findings, when coupled with the deference and private interest analysis, erroneously led the district court to dismiss their suit on the grounds of *forum non conveniens,* our review has not convinced us that the trial court abused its discretion. As a consequence, we see no reason on the facts or law to disturb its dismissal of plaintiffs' complaints on grounds of *forum non conveniens.*

CONCLUSION

Accordingly, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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SPRINGWELL NAVIGATION CORPORATION,

Plaintiff,

-against- 99 Civ. 11855 (KMW)

THE CHASE MANHATTAN BANK,

Defendant.

----------X

POLLUX HOLDING LIMITED,

Plaintiff,

-against- 99 Civ. 11856 (KMW)

THE CHASE MANHATTAN BANK,

Defendant. ORDER

----------X

WOOD, U.S.D.J.:

Plaintiffs, Liberian corporations that act as personal investment vehicles for wealthy Greek individuals, sue the Chase Manhattan Bank ["CMB"] over losses stemming from plaintiffs' investments in derivative securities sold by CMB. Plaintiffs allege misrepresentation, fraud, breach of contractual and fiduciary duties, negligence, negligent supervision, and violations of English statutory law. Defendant moves to dismiss action on the grounds of *forum non conveniens*, arguing that England is a more convenient forum to hear this lawsuit. For the reasons stated below, the Court grants this motion.

I. FACTS

A. The Parties

Pollux Holding Ltd. ["Pollux"] is a personal investment vehicle for Diamantis Diamantides, a Greek Citizen and resident engaged in the shipping industry. (Declaration of Diamantis Diamantides, dated May 19, 2000 ["Diamantides Decl."] ¶¶ 2, 4.) Springwell Navigation Corporation ["Springwell"] performs in the same capacity for Adam and Spiros Polemis, who are also Greek citizens and residents engaged in shipping. (Declaration of Adamandios Polemis, dated May 22, 2000 ["A. Polemis Decl."] ¶¶ 1, 7; Declaration of Spiros Polemis, dated May 22, 2000 ["S. Polemis Decl."] ¶ 1.)

CMB is a New York bank headquartered in New York City. (Declaration of Thomas C. Rice, dated Feb. 14, 2000 ["Rice Decl."] ¶ 1.) CMB has numerous overseas branches and affiliates, including its London branch ["CMB-London"]. (Id.) CMB also has a number of affiliates, including Chase Investment Bank Limited ["CIBL"], a U.K. affiliate engaged in emerging market-based trading; Chase Manhattan International Limited ["CIML"], a U.K. affiliate that took over emerging markets-based trading from CIBL in 1993; Chase Manhattan Securities (C.I.) Limited ["CMSCI"], a Jersey, Channel Islands affiliate; and The Chase Manhattan Bank International ["CMBI"], a Russian affiliate. (Id. ¶¶ 3-5.) Additionally, CMB operates a Private Bank, headquartered in New York, which has a branch in London. (Declaration of Mark S. Arisohn, dated May 19, 2000 ["Arisohn Decl."] ¶ 4; Rice Decl. ¶ 9.)

The Polemis family, which has been a client of CMB's Global Shipping Group for almost 50 years (A. Polemis Decl. ¶ 3), established a relationship with CMB's Private Bank in London in the late 1980s in order to make investments through CMB. (Rice Decl. ¶ 9 and Ex. A.). Diamantides opened an account with CMB London in 1988 and estab-

lished a relationship with the Private Bank in London in 1990. (Rice Decl. ¶ 9; Diamantides Decl. ¶ 4.) Plaintiffs' relationship with the Private bank was overseen by Van Mellis, head of CMB's Hellenic Group, and Finbarr Shaheen, both of whom transferred to CMB's Private Bank in London to assist plaintiffs and other Greek shipping clients (Diamantides Decl. ¶ 3; Rice Decl. ¶ 10), although plaintiffs contend that they had dealings with New York-based CMB officials (but only one meeting in New York) throughout the relevant time period (Arisohn Decl. ¶¶ 5, 8-11; A. Polemis Decl. ¶ 17). In 1994, Marco Ferrazzi replaced Mellis as head of the Hellenic Group after Mellis's departure from the bank. (Diamantides Decl. ¶¶ 6, 8; Rice Decl. ¶ 27.) In 1996, Stewart Gager, who is based in New York, took over the Hellenic Group. (Gager Decl. ¶ 2; A. Polemis Decl. ¶ 12.) According to defendant, plaintiffs also had relationships with other financial firms in London during this time period, including Merrill Lynch. (Rice Decl. ¶ 28.)

In the early 1990s, plaintiffs began purchasing emerging market investment products through Justin Atkinson, a CMIL employee who plaintiffs believed was affiliated with the Private Bank. (Springwell Compl. ¶ 17; Diamantides Decl. ¶¶ 5, 7.) Plaintiffs initially focused on Latin American securities, but later expanded their portfolio to include Russian investment products. (Rice Decl. ¶ 4; Diamantides Decl. ¶ 7.)

B. The Notes

In 1996, CMIL developed a complex derivative instrument [the "Notes"] based on Gosudarstvenniye Kratkosrochniye Beskuponniye Obligatsii ["GKOs"], short-term zero coupon Russian rouble denominated treasury bonds. The Notes, issued by CMSCI, were linked to the performance of a specific GKO, and incorporated forward foreign exchange contracts, which hedged against devaluation of the rouble. (Rice Decl. Ex. G, H § 2.) CMIL, acting through special accounts at CMBI or other Russian banks, bought the underlying GKOs.

Springwell purchased forty-two Notes between April 1996 and July 1998, and Pollux purchased 17 Notes between April 1997 and April 1998. (Springwell Compl. ¶ 41; Pollux Compl. ¶ 33.) Plaintiffs initially purchased the Notes outright, but later financed 60 to 70 percent of their purchases through CMB-London, including the purchase of all of the Notes at issue in this matter. (Diamantides Decl. ¶ 17; S. Polemis Decl. ¶ 5.) In connection with these financings, plaintiffs executed Global Master Repurchase Agreements ["Repurchase Agreements" or "GMRA"].[1] Under the terms of the Repurchase Agreements, plaintiffs bought the Notes but immediately sold them to CMB-London; the Agreements provided that plaintiffs would repurchase the Notes at maturity for the same price paid by CMB-London plus a finance charge. (Pollux Compl. ¶ 30.) Plaintiffs purchased the Notes in London but transferred the purchase funds to CMSCI's account at CMB New York (Rice Decl. Ex. L). CMB New York generated the purchase confirmations and related documentation for the Notes (S. Polemis Decl. ¶ 20; Declaration of Stephen D. Hoffman, dated May 22, 2000 ["Hoffman Decl."] at ¶ 7), and CMB New York officials were involved in various aspects of the sales of the Notes, including decisions on leverage financing. (Diamantides ¶¶ 13-14, Ex. 3.)

Both the Notes and the Repurchase Agreements contain provisions relating to choice of law and jurisdiction. The Notes contain the following provision electing both English law and exclusive English jurisdiction:

> The Note shall be governed by, and construed and interpreted in accordance with, the laws of England. Any le-

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[1] Pollux argues that its GMRA was signed only in March 1998, after the sale of the Notes at issue, and that plaintiff's repurchase prior to March 1998 are governed by an earlier agreement. (Arisohn Decl. ¶ 21.) Plaintiffs concede in their moving papers, however, that the financing for the Notes was provided through the GMRA entered into by both Springwell and Pollux (Pls.' Mem. at 10), and sue in part for rescission of the GMRAs.

> gal action or proceeding with respect to this Note . . . may be instituted exclusively in the English courts and, by execution and delivery of this Note, the parties hereto irrevocably submit to the exclusive jurisdiction of such court in any such action . . . ." (Rice Decl. Ex. G § 9(a).)

The confirmation documents generated for each Note contain summary term sheets that include the choice of law provision but not the forum selection provision. (Plaintiffs' Memorandum in Opposition, dated May 22 2000 ["Pls.' Mem."] at 38 n.10.) The Repurchase Agreements contain a provision electing English law and consenting to English jurisdiction, but not to the exclusion of other fora. (Rice Decl. Ex. I, § 17.)

C. Collapse

Plaintiffs' initial investments in the Notes were successful and yielded returns of about 11 to 15 percent. (Pls.' Mem. at 24.) In August 1998, however, the GKO market collapsed.[2] The Russian government suspended trading in GKOs, allowed the rouble to devalue, and restricted the exchange of roubles into United States dollars. (Koutentakis Decl. ¶6.) CMSCI did not pay any of the Notes that matured after the default. (Diamantides Decl. ¶ 20; S.Polemis Decl. ¶ 6.) Pollux's losses on the defaulted Notes exceeded $40 million (Koutentakis Decl. ¶ 7); Springwell lost over $87 million (S. Polemis Decl. ¶ 6.)

Following the collapse, CMB, through Stewart Gager in New York, Freddy P. de Man in London, and other CMB personnel, attempted to negotiate a restructuring of the transactions and a settlement with plaintiffs through various meetings in London, facsimiles, and telephone conversations. (Koutentakis Decl. ¶¶ 3, 7-31.)

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[2] According to plaintiffs, the GKOs were a "pyramid" scheme in which new bond issues were used to redeem maturing GKOs. (Declaration of George Koutentakis, dated May 17, 2000 ["Koutentakis Decl."], ¶ 6.)

D. The Present Action

On December 7, 1999, plaintiffs filed these consolidated actions. Plaintiffs' claims fall into two broad categories. The first category includes various allegations and causes of action involving the misfeasance of CMB and its agents in recommending and selling the Notes to plaintiffs.[3] (Pollux Compl. ¶¶ 87-110, 125-27, 134-47; Springwell Compl. ¶¶ 54-94.) Within this category are claims, inter alia, that CMB misrepresented and failed adequately to disclose the risks of the Notes and the share of the GKO proceeds that plaintiffs would receive; that CMB committed fraud and breach of contractual, statutory, and fiduciary duties in selling investments to plaintiffs that were inappropriate given plaintiffs' limited investment expertise and low tolerance for risk; and that CMB was negligent in supervising Justin Atkinson. The second category of claims involves CMB's alleged failure to manage the Notes and the related hedge contracts, after the collapse, in a manner designed to minimize plaintiffs' losses (Pollux Compl. ¶¶ 81-86, 111-24, 128-33; Springwell Compl. ¶¶ 95-102.) Specifically, plaintiffs claim that CMB failed to credit plaintiffs for, or account for, funds CMB may have received in settlements on the GKOs or as payments on the hedge contracts that were designed to protect plaintiffs from the rouble devaluation that occurred. Plaintiffs seek damages, declaratory relief, an accounting, and rescission of the Repurchase Agreements.[4]

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[3] For example, the Pollux Complaint includes, inter alia, claims that CMB and its agents breached contractual duties "by recommending to Pollux investments that were wholly unsuitable for Pollux" (Pollux Compl. ¶ 90) and breached fiduciary duties by recommending unsuitable investments without appropriate analysis and disclosure (id. ¶ 96).

[4] The Court denied plaintiffs' request to conduct limited discovery by Order dated May 5, 2000.

II. DISCUSSION

A. Standard

The doctrine of *forum non conveniens* permits a federal court to decline to entertain a case over which it has jurisdiction if dismissing the action would serve the ends of justice or the convenience of the parties. See DiRienzo v. Philip Servs. Corp., 232 F.3d 49, 56 (2d Cir. 2000). A *forum non conveniens* motion is decided in two parts. First, the court considers whether an alternative forum exists. See Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41, 46 (2d Cir. 1996). If an adequate alternative forum is available, the court then considers the provate and public convenience factors set forth in Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) to determine whether a trial in the plaintiff's chosen forum would either create "oppressiveness and vexation" for the defendant or be inappropriate because of "'considerations affecting the court's own administrative and legal problems.'" Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (citing Koster v. (American) Lumbermens Mut. Casualty Co., 330 U.S. 518, 524 (1947)).

B. Adequacy of the Alternative Forum

The first step in the Court's *forum non conveniens* analysis is to determine whether England is an adequate alternative forum. An alternative forum is adequate if defendants are "subject to service of process there" and the forum permits "litigation of subject matter of the dispute." Piper, 44 U.S. at 254; Capital Curr. Exch. v. National Westminster Bank, 155 F.3d 603, 609 (2d Cir. 1998). The parties do not dispute that CMB is subject to English service of process. Further, it is well-settled that English courts are entirely adequate to resolve commercial disputes of the type presented in this case. See Capital Curr. Exch., 155 F.3d at 609-10; MLC (Bermuda) Ltd. v. Credit Suisse First Boston Corp., 46 F. Supp. 2d 249, 253 (S.D.N.Y. 1999); Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1363 (2d Cir. 1993). Plaintiffs' concerns regarding the comparative scope of discovery and the availability of

punitive damages (Pls.' Mem at 15 n.2) are insufficient to render the English courts inadequate. See Capital Curr. Exch., 155 F.3d at 610-11 (unavailability of antitrust claims or treble damages did not bar dismissal); Roby v. Corporation of Lloyd's, 996 F.2d at 1363 ("[I]t is not enough that the foreign law or procedure merely be different or less favorable than that of the United States.") For these reasons, the Court finds that England is an adequate alternative forum for adjudication of plaintiffs' claims.

C. The *Gilbert* Factors

The second step in a *forum non conveniens* analysis is to apply the Gilbert test to determine if the balance of public and private factors favors litigation in the alternative forum. See Dorfman v. Marriott International Hotels, Inc., No. 99 Civ. 10496, 2001 WL 694423, *7 (S.D.N.Y. Jan 29, 2001). In assessing the Gilbert factors, the district court must give deference to the plaintiff's choice of forum. The appropriate level of deference in a given case depends on the plaintiff's relationship with the chosen forum. See DiRienzo, 232 F.3d at 60.

A plaintiff's choice of his "home forum" is given "substantial deference" and should "rarely" be disturbed, see Piper Aircraft, 454 U.S. at 254 n.22; Boosey & Hawkes Music Publishers v. Walt Disney Co., 145 F.3d 481, 491 (2d Cir. 1998), especially where the defendant resides in this forum, see Peregrine Myanmar Ltd. v. Segal, 89 F.3d 41 (2d Cir. 1996). A foreign plaintiff's choice of a United States forum typically is given considerably less deference. See Piper Aircraft, 454 U.S. at 256; Murray, 81 F.3d at 290. Courts in the Second Circuit apply a third level of deference to the forum choice of a foreign plaintiff who is the beneficiary of a treaty providing him with national or equal treatment in United States courts. For these plaintiffs, a district court must initially apply the same deference as it would for an American citizen, see Blanco v. Inversiones Eufrates, S.A., 997 F.2d 974 (2d Cir. 1993) (citing Treaty of Peace, Friendship, Navigation and

Commerce, Jan. 20, 1836, U.S.–Venez., art. 13, 8 Stat. 466, 472) (treaty calling for access to courts "on same terms" as nationals); Irish Nat'l Ins. Co. v. Aer Linaus Teoranta, 739 F.2d 90, 91-92 (2d Cir. 1984) (treaty between Ireland and United States calling for "national" treatment); In re Complaint of Maritima Aragua, S.A, 823 F. Supp. 142, 150 (S.D.N.Y. 1993), but should then consider, however, the residence of the parties "as a factor that bears on the inconvenience that party might suffer if required to sue in a foreign nation," see Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 102 (2d Cir. 2000). For the reasons stated below, the Court finds that it will apply this third level of deference in, this case.

Plaintiffs are the beneficiaries of a treaty between the United States and Liberia that provides that citizens of each country "shall enjoy freedom of access to the courts of justice" of the other country.[5] See Treaty Between the United States of America and Liberia Regarding Friendship, Commerce and Navigation, Aug. 8, 1938, U.S.-Lib., Art. I, 164 Recueil 1940. Although the language of the Liberian treaty does not explicitly grant equal or national treatment to Liberians suing in United States courts, the Court will assume, arguendo, that Liberians are entitled to such treatment for purposes of this motion.[6] Accordingly, the Court finds that plaintiffs deserve the same initial deference in choosing a United States court as would a United States citizen. See Blanco v. Inversiones Eufrates, S.A., 997 F.2d 974 (2d Cir. 1993); In re Maritima Aragua, S.A., 823 F. Supp. 143, 150 (S.D.N.Y. 1993). Plaintiffs are not residents of the United

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[5] The Court notes that the two plaintiffs named in this case--Pollux and Springwell--are Liberian corporations, not Greek corporations, and thus finds plaintiffs' references to a treaty between Greece and the United States to be irrelevant to this motion.

[6] Neither party briefed this specific issue, and the Court would reach the same conclusion in this case under either interpretation of the clause.

States, however, and they offer no evidence, beyond their wire transfers and FAXes with respect to the Notes, that they have any connections to the United States. Consequently, plaintiffs' choice of forum should not be accorded particularly strong deference, even assuming that the Liberian treaty grants plaintiffs' choice some extra modicum of deference. See Wiwa, 226 F.3d at 102; DiRienzo v. Philip Services Corporation, 232 F.3d 49, 62-63 (2d Cir. 2000) (noting that "the greater connections a plaintiff has to his chosen forum, the more likely is the inconvenience to him resulting from changing to a foreign forum"). The Court turns to its analysis of the Gilbert factors with this deference to plaintiffs' choice of forum in mind.

1. Public Interest Factors

A district court must consider four public interest factors in its *forum non conveniens* analysis: (1) administrative difficulties associated with court congestion; (2) the undesirability of requiring a jury "of a community which has no relation to the litigation" to sit at trial; (3) the "local interest in having localized controversies decided at home"; and (4) the appropriateness of having the case tried in a forum familiar with the applicable law rather than forcing a court to "untangle" problems in a "law foreign to itself." See Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947). The majority of these factors favor dismissal in this case.

(1) Local Interest

England has the stronger interest in this dispute for several reasons. First, plaintiffs purchased the Notes in England, and England has the strongest interest in regulating investment activity occurring within its jurisdiction; plaintiffs concede this strong interest by invoking English securities law in their complaints. Cf. Value Partners S.A. v. Bain & Company, Inc., No. 98 Civ. 1562, 1998 WL 336648, *5 (S.D.N.Y., June 22, 1998) (noting that filing of criminal actions against defendants in alternative forum demonstrated

that forum's "close connection" with the case). Second, plaintiffs concede that the interactions between parties took place predominantly in London, including meetings between Adam Polemis and Stewart Gager at Polemis's house in London. (A. Polemis Dec. ¶ 17, 18; Koutentakis Decl. ¶¶ 8, 25, 27.) Thus, although CMB New York employees played roles in the sale of the Notes to plaintiff and the workout efforts following the collapse (Arisohn Decl. ¶ 5, 8-11; Koutentakis Decl. ¶¶ 8-32; S. Polemis Decl. ¶¶ 4, 7-18), the alleged fraud and misrepresentations occurred primarily in England. Third, plaintiffs' claims that CMB breached its contractual and fiduciary duties arise out of express and implied contracts (the purchases of the Notes and the commencement of banking relationships) entered into in London. These factors support England's preeminent interest in this dispute. See Odyssey Re (London) Ltd., 85 F. Supp. 2d 282, 306-07 (S.D.N.Y. 2000) (dismissing on *forum non conveniens* grounds where misrepresentations occurred in England), aff'd 2001 WL 46565 (2d Cir. Jan 18, 2001); Allstate Life Ins. Co., 994 F.2d 996, 1002 (2d Cir. 1993) (dismissing action in part because "the actions undertaken by the Banks in furtherance of the alleged fraud were carried out in Australia by Australian corporations").

New York's interest in this dispute is considerably less than that of England. Plaintiffs' claims—that New York has an interest in overseeing CMB, which is headquartered in New York--are true but overstated.[7] Although New York certainly has a general interest in regulating a bank based in that state, see Capital Curr. Exch. v. National Westminster Bank, 155 F.3d 603, 611 (2d Cir. 1998), the majority of the acts alleged in this dispute are centered in London and involve London branches and affiliates of CMB; plaintiffs' attempt, in

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[7] The Court finds that the "know-your-client" guidelines promulgated by the Federal Reserve Bank of New York are not relevant to the *forum non conveniens* analysis. (Pls.' Mem. at 25.) The guidelines do not address the issues raised in this action and, in any event, are not binding regulations.

their moving papers, to argue the centrality of the "creation" and "marketing" of the Notes is without support in their own complaints. (Pls.' Mem. at 16, 34.) See Valùe Partners S.A., 1998 WL 336648, at *5 (rejecting importance of plaintiffs' allegations that tortuous conduct was "developed" and "hatched" in New York); see also Capital Curr. Exch., 155 F. 3d at 612; Odyssey Re (London) Ltd., 85 F. Supp. 2d at 306-07. In this regard, the Court notes that plaintiffs do not allege that the Notes were inherently illegal, but rather that CMB misrepresented the nature of the Notes in selling them.[8] Similarly, although New York does have an interest in regulating New York banks to avoid, inter alia, the alleged negligent supervision and misfeasance that occurred in New York over the disposition of any funds recouped from the GKOs or the related hedging agreements, the Court rejects plaintiffs' attempt to overstate the centrality of these claims in their moving papers; negligent supervision is only one of Pollux's thirteen causes of action, and only one of Springwell's seven causes of action.

(2) Burden on a Local Jury

As discussed above, New York has less of an interest in this dispute, and thus it would be somewhat more burdensome for a New York jury to hear this trial.[9] See Ioannides v. Marika Maritime Corp., 928 F. Supp. 374, 380 (S.D.N.Y. 1996). Because both jurisdictions can claim some interest in the action, however, there is little concern about burdening jurors in either forum, see Peregrine Myanmar, 89 F. 3d at 47, and the

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[8] For this reason, the Court finds that the declaration of Owen Carney, in which Mr. Carney speculates, inter alia, that the development of the Notes occurred in New York, is irrelevant to this motion. (Declaration of Owen Carney, dated May 18, 2000, passim.)

[9] Although it is unclear that this action would result in a jury trial in either forum (Affidavit of David William Mayhew, dated Feb. 10,2000, ¶14; Defendant's Memorandum in Support, dated Feb. 14, 2000 ["Deft.'s Mem."] 32 n.19), plaintiffs seek a jury trial and the Court considers this factor accordingly.

Court finds that the jury burden factor favors litigation in England only slightly.

(3) Conflicts of Law and Application of Foreign Law

Both parties address the applicability of English and United States law to plaintiffs' claims. Although choice of law issues "need not be definitively resolved at this point," the "likelihood that foreign law will apply weighs against retention of the action." McLaughlin v. Bankers Trust Co., No. 97 Civ. 9312, 1998 WL 355419 (S.D.N.Y. July 2, 1998) (citing Potomac Capital Inv. Corp. v. Kininklijke Luchtvaapt Maatschappli, N.V., No. 97 Civ. 8141, 1998 WL 92416 (S.D.N.Y. Mar. 4, 1998). The Court finds that it likely would apply English law to most of plaintiffs' claims.

For choice of law purposes, plaintiffs' claims fall into three categories. The first category includes the contractual claims arising with "respect" to the Notes and the financing agreements. For these claims, the Court likely would enforce the choice of law provisions contained in both the Notes and the Repurchase Agreements and apply English law.

The second category consists of those claims explicitly arising under English securities law. The Court would apply English law to decide these claims.

The third category consists of plaintiffs' tort claims. Under New York choice of law provisions, these claims would be governed by the law of the jurisdiction having the "greatest interest in the litigation." See Padula v. Lilarn Properties Corp., 84 N.Y 2d 519, 521 (1994); Schultz v. Boy Scouts of America, 65 N.Y.2d 189, 491 (1985). The parties agree that plaintiffs' tort claims arise out of laws that seek to regulate primary conduct, and thus that the Court should apply the law of the place of the tortious conduct. See Sheldon v. PHH Corp., 135 F.3d 848, 853 (2d Cir. 1998) (citing Padula, 84 N.Y.2d at 522).

As described above, the Court finds that most of the relevant conduct occurred in England. The Court notes that

plaintiffs' various negligence and fraud claims—which plaintiffs allege are the "core" of their actions (Pls.' Mem. at 35)—are premised on misrepresentations and omissions of material fact made in connection with the purchase of the Notes, and the Court finds that it likely would apply English law to all of these claims. The Court would likely apply New York law only to plaintiffs' negligent supervision claims as they relate to CMB New York and plaintiffs' conversion claims, which allege misfeasance on the part of CMB New York directly. The Court thus finds that a preponderance of the tort claims will likely be governed by English law.

For the reasons set forth above, the Court finds that all of plaintiffs' statutory and contract claims, as well as the majority of plaintiffs' tort claims, would likely be governed by English law. Consequently, the Court concludes that this factor strongly weighs in favor of litigation in England.

(4) Court Congestion and Enforceability of Judgment

The parties have offered no evidence that British courts are more or less congested that the Southern District of New York or that a judgment entered in either country would be unenforceable. Consequently, this factor favors neither forum. See Capital Curr. Exch. v. National Westminster Bank, 155 F.3d 603, 611 (2d Cir. 1998).

2. Private Interest Factors

The Court now considers the relevant private interest factors. These factors are (1) "the relative ease of access to sources of proof"; (2) the "availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses"; and (3) "all other practical problems that make trial of a case easy, expeditious, and inexpensive." Gilbert, 330 U.S. at 508.

(1) Ease of Access to Proof

Defendant contends that "innumerable documents" relating to plaintiffs' relationship with defendant are housed in London, and that some others are in Jersey, Canary Islands.

(Rice Decl. ¶29.) Defendant also claims that certain tape recordings of conversations with plaintiffs are stored in London. (Deft.'s Mem. at 27 n.15.) Plaintiffs note that CMB New York generated the transactional documentation for the Notes and that the workout efforts for the Notes was based in New York. (Pls.' Mem. at 26.) The Court finds that there undoubtedly are documents in both locations, that the documents in Jersey will need to be shipped to either New York or London, and that technological advances have minimized the burden of transporting evidence in any event. See Manu International, S.A. v. Avon Prods., Inc., 641 F.2d 62, 65 (2d Cir. 1981). The Court therefore concludes that this factor does not favor dismissal.

(2) Availability of Compulsory Process

Defendants have identified several key witnesses whose testimony can be compelled only in England. First, Finbarr Sheehan, Van Mellis, and Marco Ferrazzi, would testify to plaintiffs' sophistication and prior dealings with CMB, including plaintiffs' other investments in emerging market paper; Spiros Polemis concedes that he was involved with CMB in a defaulted emerging market investment three years before the GKO collapse (S.Polemis Decl. ¶ 17.) Second, defendant would call London representatives of Merrill Lynch and other financial institutions to present evidence about plaintiffs' investment history and sophistication. Because many of plaintiffs' claims are premised on allegations that plaintiffs were unsophisticated investors who were defrauded and sold inappropriate investments (the Notes) by CMB, the Court finds that the availability of all of these witnesses would be critical to CMB's defense at trial.

Plaintiffs have identified many New York-based CMB employees with purported connections to plaintiffs' activities. (Diamantides Decl. ¶ 26; Arisohn Decl. ¶ 35, Ex. Z.) Plaintiffs do not, however, suggest that most of these individuals would be called to testify at trial, and the Court notes that Stewart Gager has agreed to testify in England. (Gager Decl.

¶ 4.) The Court therefore finds that plaintiffs have not demonstrated that any material witnesses would be unavailable at a trial in London.

For the reasons stated above, the Court thus concludes that this factor weighs heavily in favor of dismissal. See Capital Curr. Exch. v. National Westminster Bank, 155 F.3d 603, 611 (2d Cir. 1998) (affirming district court's determination that private interests strongly favored litigation in England and noting that witnesses in "central" allegations were unavailable in the United States).

(3) Cost of Obtaining Witnesses and Other Practical Problems

With the exception of Stewart Gager, most of the witnesses likely to appear at trial witnesses reside in England. (Rice Decl. ¶¶ 26-28.) The parties have not offered evidence that the cost of obtaining witnesses in either forum would be prohibitive or that any other factors favor one forum over the other.

Consequently, the Court determines that these factors are not relevant in the Court's analysis.

Balancing the *Gilbert* Factors

Balancing the Gilbert factors, the Court concludes that this matter should be dismissed in favor of litigation in England. The Second Circuit recently held that "under certain circumstances, the public interest factors favoring dismissal might (by themselves or in combination with inconvenience to the defendant not quite rising to the level of 'oppressiveness and vexation') be strong enough to justify dismissal, notwithstanding the absence of 'oppressiveness and vexation.'" Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 102 n.9 (2d Cir. 2000) (citing Guidi v. Inter-continental Hotels Corp., 224 F.3d 142, 146 (2d Cir. 2000)). In this case, the majority of the public interest factors favor England. Although the unavailability of compulsory process may not alone rise to the level of vexation or oppressiveness, the Court

finds that the public interest factors taken in conjunction with the private interest factors in this case present the "circumstances" that counsel in favor of dismissal. See id.

The Court reaches this conclusion for several reasons. First, the Court finds that even assuming that the Liberian treaty gives plaintiffs' choice of forum extra deference, plaintiffs deserve the minimum deference due them as treaty beneficiaries because plaintiffs are not residents of the United States and, as described above, have no connection to their chosen forum. In fact, plaintiffs have made no showing that New York is in any way a convenient forum for them. Second, plaintiffs have made no showing that England would be a less convenient forum for litigation of this case. Rather, plaintiffs' declarations make it clear that their interactions with CMB were centered in London; Springwell had offices in London, for example, and Adam Polemis even conducted Springwell business with CMB at Polemis's house in London. (A. Polemis Decl. ¶ 21.) Plaintiffs also can hardly argue that England is inconvenient after consenting to English jurisdiction in signing the Repurchase Agreements. See Koster, 330 U.S. at 524 (holding that a "real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown" (emphasis added)); Cf. Evolution Online Systems, Inc. v. Koninkligke PTT Nederland N.V., 145 F.3d 505, 511 (2d Cir. 1998 (finding forum selection clause relevant in Gilbert analysis). Third, the Court rejects plaintiffs' attempts to "morphose this case into a dispute that concerns the United States" by insisting OD the centrality of the "creation and marketing" of the Notes and alleging that these activities must have been centered in New York, and by giving undue prominence to their negligent supervision claims in their opposition papers. See Capital Currency, 155 F.3d at 612; Odyssey, 85 F. Supp 2d at 306-07; McLaughlin v. Bankers Trust Company, No. 97 Civ. 9312, 1998 WL 355419, *4 (S.D.N.Y. July 2, 1998) (rejecting attempt to establish New York con-

nections through assertion that "New York makes the decisions"). For these reasons, the Court concludes that defendant has met its heavy burden of showing that New York, where defendant resides, is an inconvenient forum for litigation of this action, and concludes therefore that this case should be dismissed pursuant to the doctrine of *forum non conveniens*.

CONCLUSION

This case is dismissed on the grounds of *forum non conveniens* subject to the following conditions: (1) plaintiff may move in the Court to restore this action should England refuse to exercise jurisdiction or otherwise decline to accept this lawsuit, or if defendant refuses to submit to jurisdiction in England, or if any party or person fails to comply with the further restrictions below; (2) defendant must waive any statutes of limitations defenses that may have arisen since the commencement of this action in the Southern District of New York; (3) upon request by plaintiffs, defendant must produce any CMB employees presently located beyond the subpoena power of the English court; (4) Stewart Gager must abide by his consent to appear as a witness in an action in England. (Gager Decl. ¶ 4.)

The Clerk of Court is directed to dismiss this case. All pending motions are moot.

SO ORDERED.

Dated: New York, New York
March 30, 2001

s/ Kimba M. Wood
Kimba M. Wood
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANNE B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the day 4th of August two thousand three.

Springwell Navigation,

Plaintiff-Appellant,

v. Dkt No: 01-7492

Chase Manhattan Bank,

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by appellant Springwell navigation.

> Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for petition for rehearing en banc has been transmitted to the judges for the court in regu-

lar active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
ROSEANNE B. MACKECHNIE, Clerk
by
s/ Laura Bass Penn
Laura Bass Penn
Motions Staff Attorney

(2)

No. 03-815

Supreme Court, U.S.
FILED
DEC 17 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SPRINGWELL NAVIGATION CORPORATION,

Petitioner,

—v.—

THE CHASE MANHATTAN BANK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

THOMAS C. RICE
Counsel of Record
LAURA W. SAWYER
Of Counsel
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

MICHAEL A. O'CONNOR
Of Counsel
J.P. MORGAN CHASE & CO.
LEGAL DEPARTMENT
One Chase Manhattan Plaza
New York, New York 10081
(212) 552-1693

Attorneys for Respondent JPMorgan Chase Bank, formerly known as The Chase Manhattan Bank

QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit properly affirm the dismissal of these actions on the grounds of *forum non conveniens* where the United States District Court for the Southern District of New York found that the factors outlined in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) favored England as the appropriate forum to resolve the allegations and claims in the complaints?

PARTIES

The following is a list of all parties to the proceeding in the Court whose judgment is sought to be reviewed:

Pollux Holding Ltd.

Springwell Navigation Corp.

The Chase Manhattan Bank, now known as JPMorgan Chase Bank

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondent JPMorgan Chase Bank, formerly known as The Chase Manhattan Bank, has the following parent, subsidiary or affiliates (in which a 10% or greater interest is held) the securities or interests in which are publicly held: J.P. Morgan Chase & Co.

TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT..... 1

COUNTER-STATEMENT OF THE CASE 3

Proceedings And Dispositions Below 3

Petitioners' Relationship With Chase Was Based, And The Relevant Events Occurred, In London, England 4

REASONS FOR DENYING THE WRIT 8

I. There Is No Legal Dispute Warranting A Grant Of Certiorari Because The Court Of Appeals Correctly Found That The District Court Did Not Abuse Its Discretion In Applying The Well-Established Law Relating To The Doctrine Of *Forum Non Conveniens* ... 8

A. The District Court Carefully Weighed All Of The *Gilbert* Factors And Correctly Found That The Balancing Of The Factors Weighed In Favor Of Dismissal 8

B. Petitioners' Choice Of Forum Was Given Appropriate Deference. 12

C. The District Court Correctly Applied *Gilbert's* Compulsory Process Factor..... 14

PAGE

D. The District Court Properly Evaluated *Gilbert's* Foreign Law Factor 15

II. Petitioners' Treaty Argument Cannot Form The Basis For A Writ Of Certiorari 17

A. The Court Of Appeals And The District Court Afforded Petitioners The Appropriate Level Of Deference, Even Considering The Treaty Between Liberia And The United States 17

B. Petitioner Pollux's New Argument Alleging A Violation Of The Supremacy Clause Of The United States Constitution Was Not Properly Preserved 20

C. The Court Of Appeals' Decision Does Not Create A Split In The Circuits 23

CONCLUSION 25

TABLE OF AUTHORITIES

Cases: PAGE

Alcoa S.S. Co. v. M/V Nordic Regent, 654 F.2d 147 (2d Cir. 1980) (*en banc*)..... 19, 20

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989)..... 2, 18

Blanco v. Banco Indus. de Venezuela, 997 F.2d 974 (2d Cir. 1993)..... 20

Blau v. Lehman, 368 U.S. 403 (1962)..... 11, 14

California v. Taylor, 353 U.S. 553 (1957)..... 21

DiRienzo v. Philip Servs. Corp., 294 F.3d 21 (2d Cir. 2002)..... 12

Duignan v. United States, 274 U.S. 195 (1927)..... 21, 22

Farmanfarmaian v. Gulf Oil Corp., 588 F.2d 880 (2d Cir. 1978)..... 20

Forsythe v. Saudi Arabian Airlines Corp., 885 F.2d 285 (5th Cir. 1989)..... 13

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947)..... *passim*

Hosaka v. United Airlines, Inc., 305 F.3d 989 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 1284 (2003)..... 23, 24

Howe v. Goldcorp Invests., Ltd., 946 F.2d 944 (1st Cir. 1991)..... 19

PAGE

In re Air Crash off Long Island, New York on July 17, 1996, 65 F. Supp. 2d 207 (S.D.N.Y. 1999) 24

In re Compl. of Maritima Aragua, 823 F. Supp. 143 (S.D.N.Y. 1993) 22

In re Donald G. Atteberry, DVM, P.A. v. Barclays Bank, 159 B.R. 1 (D. Kan. 1993).. 13

Irish Nat'l Ins. Co. v. Aer Lingus Teoranta, 739 F.2d 90 (2d Cir. 1984) 20

Lawn v. United States, 355 U.S. 339 (1958) 21

Meridian Seafood Prods. v. Fianzas Monterrey, 149 F. Supp. 2d 1234 (S.D. Cal. 2001) 13

Milor v. British Airways, Plc., 1996 Q.B. 702 (Eng. C.A) 23

Montana R. Co. v. Warren, 137 U.S. 348 (1890) 21

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 21

Overseas Nat'l Airways, Inc. v. Cargolux Airlines Int'l, S.A. 712 F.2d 11 (2d Cir. 1983) 19

Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) ..... *passim*

Pollard v. United States, 352 U.S. 354 (1957)... 21

Pollux Holding Ltd. v. Chase Manhattan Bank, 329 F.3d 64 (2d Cir. 2003) 1, 4, 11, 12

PAGE

Sumitomo Shoji Am. v. Avagliano, 457 U.S. 176 (1982) 17

Sussman v. Bank of Israel, 801 F. Supp. 1068 (S.D.N.Y. 1992), *aff'd*, 990 F.2d 71 (2d Cir. 1993) 19

Taylor v. Freeland & Kronz, 503 U.S. 638 (1992) 21

Youakim v. Miller, 425 U.S. 231 (1976) 21

Treaties:

Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, U.S.-Liberia, 54 Stat. 1739 ..... 2, 24

Warsaw Convention, 49 Stat. 3000, 137 L.N.T.S. 11 (reprinted in note following 49 U.S.C.S. § 40105)..... 23

Other Authorities:

Allan Jay Stevenson, *Forum Non Conveniens And Equal Access Under Friendship, Commerce and Navigation Treaties: A Foreign Plaintiff's Rights*, 13 Hastings Int'l & Comp. L. Rev. 267 (1990) 19

Allen I. Mendelsohn & Renee Lieux, *The Warsaw Convention Article 28, The Doctrine of Forum non conveniens and the Foreign Plaintiff*, 68 J. Air L. & Com. 75 (Winter 2003)..... 24

Respondent, JPMorgan Chase Bank, formerly known as The Chase Manhattan Bank ("Respondent" or "Chase"), submits this brief in opposition to the Petitions for Writs of Certiorari ("Petitions") submitted by Pollux Holding Ltd. ("Pollux") and Springwell Navigation Corp. ("Springwell" and collectively with Pollux, "Petitioners"), who seek review of a decision of the United States Court of Appeals for the Second Circuit ("Court of Appeals") in *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64 (2d Cir. 2003). The issues raised in both Pollux's and Springwell's Petitions are virtually identical and the cases were heard and decided together in the United States District Court for the Southern District of New York ("District Court") and the Court of Appeals. This brief, which is being separately filed in response to each Petition, addresses all the issues presented by both Petitioners.

PRELIMINARY STATEMENT

The decision by the Court of Appeals does not warrant review by the Court. These Petitions involve dismissals on the grounds of *forum non conveniens* of complaints brought by foreign plaintiffs where the core allegations are the alleged actions and omissions in London, England by an employee of Chase's English affiliate, with respect to the sale of investments governed by English law, to longstanding customers of the London branch of Chase's Private Bank.

Petitioners seek to engage the Court in a rebalancing and reanalysis of the District Court's application of the well-established *forum non conveniens* factors. The District Court evaluated the allegations in the complaints, the connections between the allegations in the complaints and the selected forum (New York) and the con-

tacts between Petitioners and New York and through a careful and detailed analysis of each individual factor determined that England was the appropriate forum to hear the cases. Despite Petitioners' protestations to the contrary, the District Court not only considered the application of the treaty at issue on the *forum non conveniens* analysis, but gave the foreign Petitioners heightened deference and treated them as if they were American citizens. On appeal, the Court of Appeals affirmed that the District Court acted within its discretion and in accordance with governing precedent. To consider these Petitions at this point would necessarily require the Court to reconsider the factual determinations previously made by the District Court, and would not involve a decision on any controlling legal issues.

Petitioners attempt to create an issue for review by the Court by advancing the absurd notion that Liberian nationals, protected by the Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, U.S.-Liberia, 54 Stat. 1739 (the "Treaty"), which grants them "free access" or "freedom of access" to United States courts, have greater access to the United States courts than would United States citizens. In essence, Petitioners argue that they are immunized from the application of the doctrine of *forum non conveniens* by virtue of the "free access" provisions of the Treaty and that this immunity is somehow critical to the maintenance of good foreign trade relations. Petitioners, though, cannot sustain their position that the Treaty should provide more rights to these foreign companies than afforded to United States citizens. To the contrary, in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the Court has already decided that the term "free access," in the very same Liberian treaty at issue here, is expressly subject to local law—of which *forum non conveniens* principles are a well-established and integral

part. Petitioners have not identified a single decision by any court adopting the illogical notion that is the underpinning of the Petitions. Contrary to Petitioners' assertions, there is no Treaty issue, there is no Supremacy Clause issue, and there is no split in the Circuits. The Petitions should be denied.

COUNTER-STATEMENT OF THE CASE

Petitioners attempt to manufacture New York contacts in order to create an illusion that the District Court and the Court of Appeals ignored the "numerous connections with respondent's home forum." Springwell Pet. at 3. In fact, the numerous contacts alleged in the Petitions are at odds with Petitioners' own complaints or are unrelated to the causes of action in the complaints. Petitioners conveniently ignore the allegations in their complaints because those allegations make clear that London is the center of gravity for this dispute.

Proceedings And Dispositions Below

Pollux and Springwell, both Liberian investment companies whose principals are Greek nationals, filed separate complaints against Chase in the District Court for the Southern District of New York. JA12-51, JA53-79, JA955.[1] The complaints allege that Pollux and Springwell each lost substantial amounts of money they invested in Russian derivative investments that were sold in London, England by an employee of an English affiliate of Chase. JA957-959. The misrepresentations and breaches of duty alleged in the complaints occurred in England and Greece. JA958-960. The transaction documents contain English forum selection and choice of

[1] References to materials in the Joint Appendix in the Court of Appeals are in the form "JA__."

law provisions. JA959. Petitioners sued under English, not United States, securities laws. JA49.

Respondent moved to dismiss both actions on the ground of *forum non conveniens*. The District Court held that Chase "met its heavy burden of showing that New York, where defendant resides, is an inconvenient forum for litigation of this action, and conclude[d] therefore that this case should be dismissed pursuant to the doctrine of *forum non conveniens*." Pollux App. at 43a; Springwell App. at B18. Pollux and Springwell appealed to the United States Court of Appeals for the Second Circuit. The Court of Appeals affirmed the dismissal against both Pollux and Springwell. *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64 (2d Cir. 2003). Both the District Court and the Court of Appeals considered these actions in tandem.[2]

Petitioners' Relationship With Chase Was Based, And The Relevant Events Occurred, In London, England

The Petitions fail to acknowledge the overwhelming connection between these actions and England, and the corresponding lack of nexus between these actions and the United States. Analysis of the allegations at issue in

[2] On April 9, 2001, shortly after the District Court's dismissal, Chase commenced negative declaratory judgment actions against both Pollux and Springwell in the High Court of Justice Queen's Bench Division, Commercial Court, Royal Courts of Justice in London, England (the "High Court of Justice") to determine the parties' rights and responsibilities in connection with the investments at issue in these actions. The High Court of Justice seized jurisdiction of these cases. By the agreement of the parties, these proceedings have been stayed pending the exhaustion of Petitioners' appellate avenues in the United States. Separate from the negative declaratory judgment actions filed by Chase, Springwell recently issued a claim form in the High Court of Justice on July 18, 2003 against three Chase entities arising from the same allegations at issue in these actions.

the complaints demonstrates that Petitioners' relationship with Chase and its affiliates, and the specific investment transactions at issue, were clearly centered in London, England. Petitioners are Liberian companies that serve as investment vehicles for wealthy Greek citizens. JA12, 54, 492, 723. Pollux invests for Diamantis Diamantides. Springwell invests for Adam and Spiros Polemis. Both Mr. Diamantides and the Polemis brothers had long-standing banking relationships with Chase's Global Shipping Group, JA15, 55, 84, which is located in London, England. JA84. The Polemis brothers first established a relationship with Chase's Private Bank in London in the late 1980's in order to engage in investment activity through Chase and its affiliates. In or about 1990, Mr. Diamantides established a relationship with Chase's Private Bank in London for the same purpose. JA100-106. The Private Bank—principally in London—provided oversight for Petitioners' accounts and assisted them in confirming transactions, moving funds among accounts, and obtaining financing arrangements for investments. Any meetings with Chase's New York personnel were conducted in Europe, principally in London or Greece. JA338.

Petitioners began to purchase emerging market products through Justin Atkinson, a salesperson employed in London by Chase's English affiliate, Chase Manhattan International Limited ("CMIL"). JA15-16, 55, 57-58, 85, 950. Mr. Atkinson was never employed by Chase's Private Bank, JA950, and Mr. Diamantides and the Polemises knew that he was a sales representative working in CMIL's International Fixed Income Group in London. *See* JA107, 112. Mr. Atkinson coordinated with Mr. Diamantides and his in-house financial staff located in Greece and received orders to purchase over the telephone at his desk in London. JA85, 724, 951. Mr. Atkinson coordinated all transactions for Springwell through

Adam Polemis, who was located in London during the time of these transactions. In short, all of Petitioners' relevant contacts at Chase were in London or elsewhere in Europe.

CMIL sold an investment product that allowed non-Russian entities to effectively invest in short-term, ruble denominated Russian treasury bills, known as GKOs. JA87, 121. The product was a structured instrument called the GKO-linked (S Account) note (the "Note" or "Notes"), where the return and risks were based on the performance of a particular issue of GKOs referenced in the Note. JA87, 122-123, 125-128. The Notes were issued by Chase Manhattan Securities (C.I.) Limited ("CMSCI"), a Chase affiliate in Jersey, Channel Islands.[3] JA120, 132. CMSCI did not purchase the underlying GKOs itself; instead, investments in the GKOs were made by CMIL, which had a special account, known as an "S Account," with a Russian bank allowing it to purchase GKOs as a foreign investor. JA19-20, 32-33. The Notes were governed by English law and provided for exclusive jurisdiction in England. JA130, 142-143.

Contrary to the factual background given in the Petitions, Springwell Pet. at 2-5; Pollux Pet. at 2-4, the crux of Pollux's and Springwell's allegations in their complaints center around the alleged fraudulent inducement to purchase such Notes through the misrepresentation of facts and the failure to disclose material information to Petitioners by Mr. Atkinson in London.[4] JA64. Petitioners' orders to purchase were given to Mr. Atkinson

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[3] Jersey is one of the Channel Islands located eighty-five miles from the English coast. Jersey owes allegiance to the British Crown. *See http://www.jerseylegalinfo.je/Home/AboutJersey/default.asp* (last visited Dec. 10, 2003).

[4] Nowhere in the complaints, or anywhere else in the record, do Petitioners allege a single misrepresentation by anyone other than

in London.[5] JA85, 90, 950-51. The trading of the Notes themselves was performed in London by traders in CMIL's International Fixed Income Group. JA90.

Petitioners financed a number of their Note purchases, including each of the purchases now at issue, through repurchase agreements. In connection with such financings, Petitioners each executed a Global Master Repurchase Agreement (the "Repurchase Agreement"), under which Pollux and Springwell each bought the Notes, but then immediately resold them to Chase London. Pollux and Springwell would repurchase the Notes at maturity for the same price paid for them by Chase London, plus a finance charge.[6] The Repurchase Agreements were signed on behalf of Chase by a representative in London, and the credit exposure was booked at Chase-London and subject to English regulation. JA159, 192. The

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Atkinson. Moreover, Petitioners' contacts with other representatives of Chase or its affiliates, which were primarily social in nature, did not take place in the United States, but took place in England or elsewhere in Europe. JA952, 967-968.

[5] Petitioners wrongly assert that the investments at issue were made and managed through the Hellenic and Maritime Industries Group of Chase's Private Bank in New York. Springwell Pet. at 3; Pollux Pet. at 3. The investments were made through CMIL, Chase's English affiliate, and the Notes were issued by CMSCI, a Chase affiliate in the Channel Islands. Neither is it true, as Petitioners allege, that the marketing of those securities was directed by Chase from New York. *See* Springwell Pet. at 4; Pollux Pet. at 13.

[6] After purchasing the Notes in London, Pollux and Springwell transferred the purchase funds to their Chase accounts in New York. Consequently, purchase confirmations and related documentation for the Notes were generated in New York. Petitioners attempt to elevate these functions in order to claim that New York was intimately involved in these transactions. However, these "back office" functions that were performed in New York were administrative and no allegation is found in Petitioners' complaints as to a breach of the performance of these functions.

Repurchase Agreements are also expressly governed by English law and provide that Pollux and Springwell submit to the non-exclusive jurisdiction of the English courts. JA158, 191.

Documents relating to Petitioners' investment and financing transactions were produced in a variety of places, including the International Fixed Income Group in London, CMSCI in Jersey, Channel Islands, and the London branch of Chase's Private Bank, with "back office" and other administrative support from Chase in New York. JA91-92.

Contrary to Petitioners' assertions, the key transactions at issue in the complaints involved London-based entities: the Note purchases were made through CMIL employees and the financing for those purchases was accomplished through facilities extended by the London branch of Chase's Private Bank.

REASONS FOR DENYING THE WRIT

I. There Is No Legal Dispute Warranting A Grant Of Certiorari Because The Court Of Appeals Correctly Found That The District Court Did Not Abuse Its Discretion In Applying The Well-Established Law Relating To The Doctrine Of *Forum Non Conveniens*

A. The District Court Carefully Weighed All Of The *Gilbert* Factors And Correctly Found That The Balancing Of The Factors Weighed In Favor Of Dismissal

The doctrine of *forum non conveniens* gives a trial court discretion to refuse to exercise its jurisdiction when it appears that another forum may be appropriate for the resolution of the matter, either for the conve-

nience of the parties or to serve the ends of justice. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 503 (1947). The law on *forum non conveniens* is well established and clearly articulated by the Court in *Gilbert* and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). In evaluating whether a case should be dismissed on the basis of *forum non conveniens*, a district court must first determine whether an adequate alternative forum exists, and, if so, then balance the public and private interest factors to determine which forum would be more appropriate for the matter to be resolved. *See Gilbert*, 330 U.S. at 507-09. It is well settled that a *forum non conveniens* analysis rests in the sound discretion of the trial court and should only be disturbed if the court clearly abused its discretion. *Piper*, 454 U.S. at 257 ("[W]here the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves *substantial deference*.") (emphasis added).

The District Court properly considered the arguments and evidence presented to it and first determined that England would be an adequate alternative forum.[7] Pollux App. at 31a; Springwell App. at B7. Then, based upon the allegations in the complaints and the evidence presented, the District Court carefully weighed each of the "private interest" and "public interest" factors articulated in *Gilbert* and determined that England would be

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[7] Petitioners engage in a discussion of the relative merits of various possible fora for this action, including New York, Greece and Liberia. *See* Pollux Pet. at 12-13; *see generally* Springwell Pet. at 14. However, that analysis was not shared with the District Court and thus was not considered by the District Court in dismissing the complaints. Chase argued in its motion to dismiss that London would be a more convenient forum. Consequently, the District Court and the Court of Appeals properly focused on whether London or New York would be a more convenient forum for resolution of this dispute.

the more appropriate forum. Pollux App. at 41a; Springwell App. at B17. Specifically, with respect to the "public interest" factors, the District Court made the following findings:

- *Local Interest*: England has a stronger interest in the dispute than New York because the Notes were purchased in England; English securities law applied to the transactions; most interactions between the parties took place in England; the alleged fraud and misrepresentation occurred primarily in England; and the contracts at issue were entered into in England.
- *Burden on a Local Jury*: The jury burden factor favors litigation in England only slightly.
- *Conflict of Laws and Application of Foreign Law*: Since the majority of Petitioners' claims would likely be governed by English law, this factor strongly weighs in favor of dismissal.
- *Court Congestion and Enforceability of Judgment*: This factor favors neither forum.

With respect to the "private interest" factors, the District Court made the following findings:

- *Ease of Access to Proof*: Since there are documents in multiple locations, this factor does not favor dismissal.
- *Availability of Compulsory Process*: The existence of material witnesses that could only be compelled to testify in England weighs heavily in favor of dismissal.
- *Cost of Obtaining Witnesses and Other Practical Problems*: In the modern era, these factors are not relevant to the analysis.

In recognition that the District Court properly applied the *Gilbert* factors, the Court of Appeals deferred to the District Court's discretion and affirmed the decision to dismiss the actions on the grounds of *forum non conveniens*. *Pollux v. Chase*, 329 F.3d at 77-78. The Court of Appeals' decision appreciates the District Court's deliberate and thoughtful analysis of the facts and evidence before it. Neither the District Court's opinion nor the decision of the Court of Appeals conflict with this Court's precedent. Rather, the opinions below adhere to the cautious and discretionary application of the doctrine of *forum non conveniens*.

Petitioners argue that despite the District Court's careful analysis of the allegations and evidence in accordance with the *Gilbert* factors, the Court should grant a writ of certiorari to reconsider the District Court's factual findings. *See* Pollux Pet. at 12-14; Springwell Pet. at 13-15. Petitioner Springwell specifically requests the Court to review the factual determinations made by the District Court, and affirmed by the Court of Appeals, regarding the relative weight certain *Gilbert* factors received. *See* Springwell Pet. at 15-18. Accepting these arguments would undermine the well-established principle that *forum non conveniens* analysis rests within the sound discretion of the District Court. *See Piper*, 454 U.S. at 257; *see also Blau v. Lehman*, 368 U.S. 403, 408 (1962) (holding that the Court will not overturn factual findings made by a district court and affirmed by court of appeals absent "clear error"). However, in the interest of completeness, Respondent will address the specific factual findings raised by Petitioners as possible arguments on which to grant a writ of certiorari.

B. Petitioners' Choice Of Forum Was Given Appropriate Deference

Contrary to Petitioners' contentions, Pollux Pet. at 11-12; Springwell Pet. at 10, both the District Court and the Court of Appeals afforded appropriate deference to Petitioners' choice of forum. The District Court afforded Petitioners "the same initial deference in choosing a United States court as would a United States citizen." Pollux App. at 33a; Springwell App. at B9. As the Court of Appeals acknowledged, even a United States citizen's choice of forum is not dispositive; instead, the level of deference depends upon the connection between the plaintiff and the forum. *Pollux v. Chase*, 329 F.3d at 72 (citing *DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 28 (2d Cir. 2002) ("The level of deference given to a plaintiff's choice of forum depends on the bona fide connection the plaintiff has with that forum.")). The District Court considered the contacts that Petitioners had with the chosen forum and then concluded that despite being given the deference of United States citizens who are not residents of the forum, Petitioners' lack of contacts with New York justified dismissal in favor of a more convenient forum, England. *Id.* The Court of Appeals affirmed the District Court's analysis and concluded that Petitioners should be given the "deference afforded a U.S. citizen living abroad who sues in a U.S. forum." *Pollux v. Chase*, 329 F.3d at 73.

Petitioner Springwell asserts that the Court of Appeals focused "on residence rather than on treaty rights and citizenship status." Springwell Pet. at 10. This claim is misplaced. The Court of Appeals looked to the contacts Petitioners had with the United States *after* it accepted the level of deference given to Petitioners by the District Court. The Court of Appeals found the absence of contacts with the forum a significant factor in the *forum non*

conveniens analysis, just as other courts have looked to a United States citizen's contacts in determining whether to dismiss a case in favor of a foreign forum. Indeed, many courts have dismissed United States citizen's claims based upon *forum non conveniens*. *See Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 290-91 (5th Cir. 1989) (finding *forum non conveniens* dismissal appropriate in an action brought by an American citizen against a Saudi Arabian airline where allegations giving rise to the cause of action occurred in Saudi Arabia); *Meridian Seafood Prods. v. Fianzas Monterrey*, 149 F. Supp. 2d 1234, 1238 (S.D. Cal. 2001) (dismissing action brought in California by California corporation where *Gilbert* factors weighed in favor of litigation in Mexico); *In re Donald G. Atteberry, DVM, P.A. v. Barclays Bank*, 159 B.R. 1, 7-8 (D. Kan. 1993) (affirming *forum non conveniens* dismissal against a United States citizen in favor of litigation in England).

Petitioner Springwell also takes issue with the fact the proposed alternative forum, London, England, is home to neither party and questions why Respondent seeks to remove this action there. Springwell Pet. at 13-14. The simple answer is that London is a more convenient forum in which to litigate these actions. All parties have strong connections with London. Petitioner Springwell, at the time it was doing the transactions at issue in its complaint, maintained offices in London and the Springwell representative who made the trades lived there. Chase also has a substantial presence in London, including its English affiliate with which Petitioners made every one of the emerging market investments that are the subject of the lawsuits. Moreover, nearly all of the relevant events alleged in the complaints occurred in London. The contacts with London were overwhelming; so much so that when the District Court dismissed the complaints Chase itself commenced declaratory judg-

ment actions in English courts, and Springwell has likewise initiated its own action there on the same matters at issue here.

Petitioners also fail to mention, as they have acknowledged in briefing to the District Court, that they chose a United States forum because it provides broader discovery and punitive damages not available in England. Petitioners' unfounded criticism of the District Court's decision that London provided an appropriate alternative forum to the one they shopped for cannot provide any basis for granting certiorari.

C. The District Court Correctly Applied *Gilbert's* Compulsory Process Factor

Petitioner Springwell argues that the Court of Appeals erred in endorsing the District Court's finding that the compulsory process factor "weighs heavily in favor of dismissal." Springwell Pet. at 15. In doing so, Petitioner Springwell is asking the Court to revisit the careful factual determinations made by the District Court. Although the Court will not overturn factual finding absent clear error, *see Blau*, 368 U.S. at 408, Respondent will address this point below.

Petitioner Springwell asserts that the compulsory process factor is only applicable if there is a showing that witnesses are "unwilling" to appear. *Id.* This is not the law as outlined in one of this Court's seminal cases on *forum non conveniens*, *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). In *Piper*, the Court addressed the type of evidentiary support required to show that relevant witnesses were available only in the alternative forum. The Court specifically held that it was not necessary for

> defendants seeking forum non conveniens dismissal [to] submit affidavits identifying the witnesses they

> would call and the testimony these witnesses would provide if the trial were held in the alternative forum . . . . [Rather,] defendants must provide enough information to enable the District Court to balance the parties' interests . . . [such as] affidavits describing the evidentiary problems they would face if the trial were held in the United States.

Id. at 258-59. In *Piper*, the Court found adequate an affidavit that set forth a list of potential witnesses located in the alternative forum. *See id.* at 259. No additional showing of unwillingness was required.

In these actions, the District Court reviewed a list of witnesses that would be called at trial, their present whereabouts, and the substance of their testimony. Based upon this evidence, the District Court concluded that the availability of London-based witnesses "would be critical to [Chase's] defense at trial." Pollux App. at 40a; Springwell App. at B15. Further, the District Court found that Petitioners "have not demonstrated that any material witnesses would be unavailable at a trial in London." Pollux App. at 41a; Springwell App. at B16. The Court of Appeals affirmed. Since the District Court followed the law as set forth in *Piper*, the Court of Appeals' failure to require proof of "unwillingness" cannot be considered "clear error" justifying this Court's reconsideration of the factual analysis done by the District Court.

D. The District Court Properly Evaluated *Gilbert's* Foreign Law Factor

Petitioner Springwell argues that the foreign law factor of *Gilbert* is inapplicable since both local and foreign law may apply regardless of whether the case is heard in England or the United States. *See* Springwell Pet. at 17-18. Again, Petitioner Springwell is asking the Court to

revisit a factual finding made by the District Court and affirmed by the Court of Appeals. The District Court carefully examined the complaints to determine whether English law or U.S. law would apply to each claim. The District Court found, and the Court of Appeals affirmed, that English law would apply to the vast majority of Petitioners' claims. Clearly, English law would apply to Petitioners' claims brought under the English securities laws. Additionally, the District Court properly concluded that a court "likely would enforce the [English] choice of law provisions" contained in the Notes and the financing agreements. JA971. The District Court further found that English law would primarily apply to Petitioners' tort claims since most of the relevant conduct occurred in England.

On balance, the District Court concluded that English law would be the primary governing law for the complaints and that the factor weighed in favor of dismissal. Petitioner Springwell's invitation for the Court to reconsider this analysis would not further the development of *forum non conveniens* jurisprudence and should be rejected.[8]

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[8] Moreover, Petitioner Springwell seeks to elevate the importance of this single factor in contravention to the balancing of all of the factors required by this Court's decision in *Gilbert*. *See* Springwell Pet. at 17. Again, the District Court balanced *each* of the *Gilbert* factors and found that the foreign law factor was just one of the public interest factors that weighed in favor of dismissal. Since Petitioner Springwell merely seeks a rebalancing of the *Gilbert* factors, with an undue emphasis on this factor, there is no basis for the Court to review this issue.

II. Petitioners' Treaty Argument Cannot Form The Basis For A Writ Of Certiorari

A. The Court Of Appeals And The District Court Afforded Petitioners The Appropriate Level Of Deference, Even Considering The Treaty Between Liberia And The United States

The thrust of Petitioners' argument is that the grant of "free access" or "freedom of access" to United States courts in the Treaty gives Liberians *greater rights* than American citizens enjoy. Pollux Pet. at 6; Springwell Pet. at 9. Petitioners assert, without citation to any applicable authority, that by the application of the Treaty, they should be considered immune from the doctrine of *forum non conveniens*. This baseless argument falls far short of creating a basis on which to grant certiorari.

The United States has entered into a number of treaties with other nations that are designed to provide the citizens of each country reciprocal privileges in the other signatory country. However, these treaties are not designed to give greater rights than those afforded citizens. *See Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 187-188 (1982) ("The purpose of the Treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right to conduct business on an equal basis without suffering discrimination based on their alienage."). Petitioners' attempt to construe the "free access" provision in the Treaty in any other fashion is inconsistent with the purpose and intent of the Treaty.

In this case, both the Court of Appeals and the District Court gave Petitioners, foreign corporations, deference in light of the Treaty, which affords Liberian corporations "free access" to United States courts. *See* Pollux

App. at 61A. Instead of treating Petitioners as foreign plaintiffs not protected by a treaty, the lower courts concluded that the Treaty provided Petitioners with the level of deference given to American citizens living abroad, and conducted the *forum non conveniens* analysis with that deference in mind. Pollux App. at 33a; Springwell App. at B9.

The Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) is particularly instructive on the interpretation of the "free access" phrase found in the Treaty. In that case, a Liberian corporation brought an action in Federal District Court against the Republic of Argentina. The Liberian corporation alleged that its oil tanker was severely damaged when it was attacked in international waters by Argentine military aircraft during the war between Great Britain and the Republic of Argentina and that it was entitled to damages under the Alien Tort Statute. The Republic of Argentina argued that it was immune from suit under the Foreign Sovereign Immunity Act ("FSIA"). In response, the Liberian corporation argued that the treaty between the United States and Liberia—the very same treaty at issue in this case—created an exception to the FSIA because of its "free access" provision. The Court rejected this argument based on the language of the Treaty, which states, in pertinent part, that the nationals of the United States and Liberia "shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws." *Id.* at 443. According to the Court, "[t]he FSIA is clearly one of the 'local' laws to which respondents must 'conform' before bringing suit in United States courts." *Id.* Thus, the Republic of Argentina was entitled to sovereign immunity and the case was dismissed. It necessarily follows that the same "free access" clause of the

Treaty does not create an exception to the doctrine of *forum non conveniens* for Liberian citizens.

The decision in *Argentine Republic* is consistent with how American citizens are treated with respect to well-established law such as *forum non conveniens*. All parties that proceed in the courts of the United States, including American citizens, are subject to the doctrine of *forum non conveniens*. *See, e.g., Howe v. Goldcorp Invests., Ltd.*, 946 F.2d 944, 950-953 (1st Cir. 1991) (affirming *forum non conveniens* dismissal in favor of Canada); *Overseas Nat'l Airways, Inc. v. Cargolux Airlines Int'l, S.A.* 712 F.2d 11, 14 (2d Cir. 1983) (stating that a plaintiff's forum choice is not entitled to automatic dispositive weight); *Alcoa S.S. Co. v. M/V Nordic Regent*, 654 F.2d 147, 159 (2d Cir. 1980) (*en banc*) (stating that "American citizenship is not an impenetrable shield against dismissal on the grounds of *forum non conveniens*" and "American citizenship alone is not a barrier to dismissal on the grounds of FNC"); *Sussman v. Bank of Israel*, 801 F. Supp. 1068, 1073 (S.D.N.Y. 1992), *aff'd*, 990 F.2d 71 (2d Cir. 1993) (stating that "[o]n more than one occasion the Court of Appeals has affirmed *forum non conveniens* dismissal requiring litigation abroad of a claim by an American citizen or a party holding that status."). Treaty beneficiaries are no exception to this rule.

As *Argentine Republic* makes clear, laws such as the doctrine of *forum non conveniens* apply with equal force to parties that enjoy the protection of a treaty, such as Petitioners. *See* Allan Jay Stevenson, *Forum Non Conveniens And Equal Access Under Friendship, Commerce and Navigation Treaties: A Foreign Plaintiff's Rights*, 13 Hastings Int'l & Comp. L. Rev. 267, 277 (1990) ("when a foreign plaintiff sues in a United States court and is entitled to the benefit of a [Friendship, Commerce and

Navigation] treaty, the United States court is obligated to apply the same *forum non conveniens* standards as it would apply to a nonresident United States plaintiff suing upon diversity grounds."). There simply is "[n]o treaty [that] requires that foreign nationals receive more favorable treatment in our courts than would an American litigant." *Alcoa S.S. Co.*, 654 F.2d at 163 (dissent).[9]

B. Petitioner Pollux's New Argument Alleging A Violation Of The Supremacy Clause Of The United States Constitution Was Not Properly Preserved

Petitioner Pollux alleges that the Court of Appeals violated the Supremacy Clause of the United States Constitution by affirming a dismissal on the grounds of *forum non conveniens* when a foreign plaintiff is a ben-

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[9] Additionally, there is simply no support for Petitioners' contention that the "free access" language found in the Treaty provides greater rights than "national access." Pollux Pet. at 9; Springwell Pet. at 9. "National access" provides the greatest rights to foreign citizens; rights equivalent to that enjoyed by United States citizens. *See Blanco v. Banco Indus. de Venezuela*, 997 F.2d 974, 981 (2d Cir. 1993) (holding that no lesser presumption should be accorded to a foreign plaintiff's choice of forum "when a treaty with a foreign nation accords its nationals access to our courts equivalent to that provided American citizens"); *Alcoa S.S. Co.*, 654 F.2d at 153 n.6 (discussing "access to courts" and "no less favorable treatment" clauses *in forum non conveniens* context); *Farmanfarmaian v. Gulf Oil Corp.*, 588 F.2d 880, 882 (2d Cir. 1978) (stating that a treaty allowed foreign nationals access to our courts "on terms no less favorable" than those applicable to American citizens). Moreover, as conceded by Petitioner Pollux, even when a treaty affords "national access," a plaintiff protected by that treaty is not immune from *forum non conveniens* dismissal. Pollux Pet. at 9. "The same *forum non conveniens* standards that [the District Court] would have applied to a United States citizen" must be applied to a foreign plaintiff who has "national access" to American courts. *See Irish Nat'l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 91-92 (2d Cir. 1984).

eficiary of a treaty with the United States. *See* Pollux Pet. at i, 5. However, this is the first time that either Petitioner has argued that the Supremacy Clause might be implicated by the motion to dismiss on the grounds of *forum non conveniens*. Since this argument was not raised or resolved below, the Court should not grant certiorari to consider it.

"Ordinarily, this Court does not decide questions not raised or resolved in the lower court[s]." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 645 (1992) (citations omitted); *see also Duignan v. United States*, 274 U.S. 195, 200 (1927) (stating that the Supreme Court "sits as a court of review . . . [i]t is only exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed"); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957); *Lawn v. United States*, 355 U.S. 339, 362 n.16 (1958); *Montana R. Co. v. Warren*, 137 U.S. 348 (1890) (concluding that when the judgment of a court is challenged . . . its rulings alone are open to consideration). This principle helps to maintain the integrity of the process of certiorari. *See Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) ("Indeed, respondent's argument might have prevailed had it been made to the Court of Appeals. . . . Here we granted certiorari to review an issue squarely presented to and decided by the Court of Appeals, and we will proceed to decide it.").[10] As such, the Court

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[10] There are no unusual circumstances in this case that would warrant a departure from the general rule. *See, e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976) (considering new issue where subsequent to the lower courts' rulings the statute at issue was interpreted in such a way that remanding the case to the District Court would cause the case to be resolved on non-constitutional grounds); *Pollard v. United States*, 352 U.S. 354 (1957) (considering new issues where the petitioner was not represented by counsel below or upon his petition for certiorari). Since there has not been a change in law or extenuating

should not expand its review to consider an issue that was not properly preserved.

In any event, the Supremacy Clause of the United States Constitution does not give Petitioners immunity from the doctrine of *forum non conveniens*. *See Gilbert*, 330 U.S. at 507 ("The principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute."). While it may be true that under the Supremacy Clause treaties are accorded the same status as the Constitution and statutes, as mentioned above, even American citizens and corporations protected by the laws and Constitution of the United States are subject to the doctrine of *forum non conveniens*. No one has an absolute right, either by virtue of a treaty or the United States Constitution, to sue in United States courts. *See In re Compl. of Maritima Aragua*, 823 F. Supp. 143, 150 (S.D.N.Y. 1993) (noting that an American citizen does not enjoy an absolute right to sue in an American Court, and a plaintiff, protected by treaty, is subject to the same *forum non conveniens* analysis). This is not an issue as to the interpretation of a treaty, but instead a request that a foreign party be given more protections than those enjoyed by citizens of the United States. The Supremacy Clause only requires the courts to consider and give appropriate deference to the Treaty, which both the District Court and the Court of Appeals did.

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circumstances that prevented Petitioner Pollux from raising these arguments before the Court of Appeals, a grant of certiorari is not warranted. *See Duignan*, 274 U.S. at 200.

C. The Court Of Appeals' Decision Does Not Create A Split In The Circuits

Petitioner Pollux also argues that the Court should grant its Petition because the Court of Appeals' "decision in the instant case conflicts with the Ninth Circuit's ruling in *Hosaka*." Pollux Pet. at 7. Petitioner Pollux is incorrect. *Hosaka v. United Airlines, Inc.*, 305 F.3d 989 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 1284 (2003), addresses the doctrine of *forum non conveniens* as it applied to a case arising under the Warsaw Convention and cannot be seen as precluding the application of the doctrine to all cases where a plaintiff has the benefit of a treaty with the United States. The Warsaw Convention is fundamentally different from the Treaty at issue in this case, and the Court of Appeals' decision in this case has not created a split in the circuits.

Article 28(1) of the Convention for the Unification of Certain Rules Relating to International Transportation by Air (known as the "Warsaw Convention"), Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 (reprinted in note following 49 U.S.C.S. § 40105), specifies four fora in which an action for damages arising from international transportation may be brought.[11] The Court of Appeals for the Ninth Circuit held that by establishing specific fora in which a plaintiff may bring suit, the Warsaw Convention prescribes that a plaintiff's choice of one of these fora is "presumptively convenient." *Hosaka*, 305 F.3d at 995 (discussing *Milor v. British Airways, Plc.*, 1996 Q.B. 702 (Eng. C.A)). The Warsaw Convention is

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[11] The four fora are: (1) where the carrier is domiciled; (2) where the carrier has its principal place of business; (3) where the carrier has a place of business through which the contract was made; or (4) the place where the transportation was to end, known technically as the "place of destination." Warsaw Convention, 49 Stat. 3000, 137 L.N.T.S. 11 (reprinted in note following 49 U.S.C.S. § 40105).

thus quite different than the Treaty of Friendship, Commerce and Navigation between the United States of America and Liberia, 54 Stat. 1739, where no appropriate forum for suit is designated. Instead, the Liberian Treaty provides that Liberian corporations "shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws." Pollux App. at 61a

Any split in authority that may exist between the Ninth Circuit's *Hosaka* decision and other Circuits' decisions interpreting the Warsaw Convention would not be resolved by granting a writ of certiorari in this case. The split in the Circuits, as described by Petitioner Pollux, concerns the applicability of *forum non conveniens* in Warsaw Convention cases, not in treaty cases as a whole. *See* Allen I. Mendelsohn & Renee Lieux, *The Warsaw Convention Article 28, The Doctrine of Forum non conveniens and the Foreign Plaintiff*, 68 J. Air L. & Com. 75, 112 (Winter 2003) ("[T]here always seemed to be general agreement, until the *Hosaka* decision, . . . that FNC was a procedural tool available to federal courts under Warsaw Article 28(2)"); *see also In re Air Crash off Long Island, New York on July 17, 1996*, 65 F. Supp. 2d 207, 213 (S.D.N.Y. 1999) (stating that "[t]he fact that the Warsaw Convention has a special venue provision does not, by itself, preclude the possibility of dismissal on *forum non conveniens* grounds"). Since Petitioners are beneficiaries of the Treaty between Liberia and the United States, not the Warsaw Convention, any review done by the Court would not resolve any potential conflict that may exist.[12]

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[12] Notably, the Court decided earlier this year to deny certiorari in *Hosaka*, a case that could have resolved the very conflict Petitioner Pollux contends is at issue here. *Hosaka v. United Airlines, Inc.*, 123 S. Ct. 1284 (2003) (denial of cert.).

CONCLUSION

For the reasons set forth above, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS C. RICE
Counsel of Record
LAURA W. SAWYER
Of Counsel
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

MICHAEL A. O'CONNOR
Of Counsel
J.P. MORGAN CHASE & CO.
LEGAL DEPARTMENT
One Chase Manhattan Plaza
New York, New York 10081
(212) 552-1693

Attorneys for Respondent JPMorgan Chase Bank, formerly known as The Chase Manhattan Bank

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No. 03-815

IN THE

Supreme Court of the United States

SPRINGWELL NAVIGATION CORPORATION,

Petitioner,

v.

THE CHASE MANHATTAN BANK,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Petitioner

Dated: December 31, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

Pages

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
STATEMENT OF THE CASE 1
REASONS FOR GRANTING THE WRIT 2
I. The Second Circuit Applied the Wrong Standards of Deference, in Conflict with Other Circuits 2
A. Treaty-Based Deference to Choice of a U.S. Forum. 2
B. Plaintiff's Choice of Defendant's Home Forum. 6
II. The Second Circuit Eliminated Witness Unwillingness to Appear as an Element of *Gilbert*'s Compulsory-Process Factor, in Conflict with Other Circuits. 6
III. The Second Circuit Erroneously Applied *Gilbert*'s Foreign-Law Factor to a Case of Mixed Law of Common Heritage. 9
IV. This Case Raises Important and Recurring National Issues. 10
CONCLUSION 10

TABLE OF AUTHORITIES

Pages

Cases

Argentine Republic v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) 4

Burt v. *Isthmus Development Corp.*, 218 F.2d 353 (CA5), *cert. denied*, 349 U.S. 922 (1955) 3

Donald G. Atteberry, DVM, P.A. v. *Barclays Bank PLC* (*In re Donald G. Atteberry, DVM, P.A.)*, 159 B.R. 1 (D. Kan. 1993) 5

Gulf Oil Corp. v. *Gilbert*, 330 U.S. 501 (1947) 7

Meridian Seafood Prods., Inc. v. *Fianzas Monterrey, S.A.*, 149 F. Supp.2d 1234 (S.D. Cal. 2001) 5

Piper Aircraft Co. v. *Reyno*, 454 U.S. 235 (1981) 7

Reid-Walen v. *Hansen*, 933 F.2d 1390 (CA8 1991) 3

Treaties

Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, U.S.-Liberia, 54 Stat. 1739 4

For purposes of deciding whether to grant certiorari, the most salient aspect of respondent's Opposition is its silent concession of the three discrete circuit splits identified by petitioner Springwell. Those splits involve: (1) the degree of deference given to the choice of forum by a citizen-equivalent plaintiff; (2) the degree of deference given to a plaintiff's choice of the *defendant's* home forum; and (3) whether *Gilbert*'s compulsory-process factor requires some showing that non-resident witnesses would be "unwilling" to attend trial in the chosen forum. Each of those splits involves a significant issue concerning the legal boundaries of the *forum non conveniens* analysis that deserves this Court's attention. Together, they present an especially efficient opportunity for this Court to reestablish the inter-circuit uniformity of legal rules in a long-neglected area of the law that is sorely in need of this Court's guidance.

STATEMENT OF THE CASE

As described in the Petition, this case involves facts and wrongdoing in multiple locations, including New York, London, Jersey, Moscow, and Greece. Pet. 3-5. Respondent's selectively distorted description of the case as involving nothing more than the acts and omissions of a salesperson in London is simply wishful fiction. Even the district court conceded that at least two of the counts in Springwell's complaint involve direct misfeasance by Chase New York personnel, Pet. App. B12, B14, and it is undisputed that Stuart Gager, who was responsible for Springwell's account during the relevant period and whose actions and failures constitute many of the alleged wrongs, ran the Hellenic Group from New York. This case thus unquestionably has substantial connections with *both* New York and London, and the facts and allegations of the complaint relating to New York are plain in the record.

Ultimately, however, Chase's fictional narrowing of the case to only that subset of conduct that occurred in London is

irrelevant to the questions presented by the Petition. The deference question turns on Springwell's treaty-based right to citizen-equivalent freedom of access to U.S. courts and on *Chase*'s residence in New York. The compulsory-process question turns on the undisputed absence of any evidence or finding that friendly Chase witnesses would be unwilling or unable to appear in New York. And the foreign-law question turns on the conceded applicability of mixed New York and English law to the various claims in the compiaint. Aside from atmospherics, therefore, Chase's distorted description of the facts has nothing to do with the issues this Court is being asked to decide or the appropriateness of granting certiorari.

The questions presented by Springwell's petition each raise clean issues of law that are ripe for this Court's resolution and this case is an excellent vehicle for addressing those issues. It is not the facts as found that are in contention, but rather the legal relevance of those facts, the legal standards against which those facts must be measured, and the legal requirement for the consideration of additional facts that were *not* found or even considered by the courts below. Had the proper legal standards been applied to this case, the outcome would necessarily have been different, and clarification of those legal standards will have a beneficial impact well beyond the particular facts of this case.

REASONS FOR GRANTING THE WRIT

I. THE SECOND CIRCUIT APPLIED THE WRONG STANDARDS OF DEFERENCE, IN CONFLICT WITH OTHER CIRCUITS.

A. Treaty-Based Deference to Choice of a U.S. Forum.

The Second Circuit in this case disparaged the significance of the U.S.-Liberian treaty for purposes of deference, denying that the treaty provided court access equal to that of U.S. citizens and dismissing the importance of "citizen"-equivalent access in any event. Such erroneous holdings do

great damage to the value of the U.S.-Liberian and similarly worded treaties and create a conflict with other circuits that give substantial deference based on citizenship.

Respondent makes no attempt to defend the Second Circuit's erroneous interpretation of the U.S.-Liberian treaty as providing less than citizen-equivalent deference. Instead it only claims that the district court gave petitioner the same deference as a non-resident United States citizen. BIO 2, 12. But the deference given by the district court was trivial at best, and well below the deference accorded by other courts based on citizenship *per se*, aside from residence. *Compare* Pet. App. B10, B17 ("plaintiffs' choice of forum should not be accorded particularly strong deference, even assuming the Liberian treaty grants plaintiffs' choice some extra modicum of deference"; as non-residents, "plaintiffs deserve the minimum deference due them as treaty beneficiaries"), *with Burt* v. *Isthmus Development Corp.*, 218 F.2d 353, 357 (CA5) ("courts should require positive evidence of *unusually extreme circumstances* * * * before exercising any such discretion to deny a citizen access to the courts of this country") (emphasis added), *cert. denied,* 349 U.S. 922 (1955) *and Reid-Walen* v. *Hansen,* 933 F.2d 1390, 1394 (CA8 1991) ("the relevant distinction is whether or not the plaintiff who has selected the federal forum is a United States citizen").

Furthermore, the Second Circuit denied even the inadequate deference given by the district court, holding that "the Liberian treaty does not afford the plaintiffs' choice of a United States forum the same deference as that afforded the choice of a U.S. citizen." Pet. App. A11. And even discussing the hypothetical maximum of citizenship-based deference, the court denigrated the value of citizenship as irrelevant to convenience and hence refused to assign a supposedly "artificial weight to citizenship." Pet. App. A12. Such cavalier dismissal of the deference due citizens and citizen-equivalent litigants is in plain conflict with the significant deference triggered by citizenship itself in the Fifth and Eighth Circuits.

Respondent's non sequitur response that citizenship does not provide absolute *immunity* under *forum non conveniens*, BIO 13, 17, does nothing to rebut the importance of the substantial deference owed to foreign litigants with treaty-based "freedom of access to the courts and citizen-equivalent rights to bring suit in the United States. A lack of absolute immunity is fully consistent with the still substantial insulation from dismissal that proper citizen-equivalent deference provides to citizen litigants.[1]

Appropriate deference may not prevent dismissal in *exceptional* cases where two foreign parties are remitted to either the plaintiff's or the defendant's home forum abroad, but it certainly stands as a barrier to dismissal of this unexceptional suit against a New York defendant in a New York forum on claims that involve conduct spanning multiple jurisdictions *including* New York. That only three of the ten *Gilbert* factors are even alleged to apply to this case at all amply illustrates the tenuous and unexceptional nature of the balance and the consequence of an incorrect determination of deference. Had the courts below applied even a semblance of the

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[1] The holding in *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989), that the U.S.-Liberian treaty's court-access provision is subject to "local laws" such as the Foreign Sovereign Immunities Act does nothing to support the decision below. The issue here is not whether *forum non conveniens* applies *at all* – petitioners have never suggested that it does not – but rather whether the discriminatory focus on a treaty-beneficiary's *residence* denies freedom of access by converting *forum non conveniens* dismissals into the presumptive rule rather than the rare exception. Unlike the FSIA, such a restriction on access based on residence is precisely *not* the sort of general "local law" contemplated by the treaty's access provision. Where the treaty intends residence to be controlling, it expressly says so. *See, e.g.*, Treaty of Friendship, Commerce and Navigation, Aug. 8, 1938, U.S.-Liberia, 54 Stat. 1739, Art. I (assuring equality of taxes for nationals of either party "within the territories of the other"); *id.* Art. XVIII (assuring certain equal rights and privileges to nationals of either party "within the territories of the other").

appropriate deference, it would have been apparent that this case should remain in New York.

Even the cases cited by respondent illustrate the point that the dismissal of a citizen plaintiff requires a far greater imbalance in convenience than is alleged to exist in this case. For example, in *Forsythe* v. *Saudi Arabian Airlines Corp.*, 885 F.2d 285, 290-91 (CA5 1989), the defendant was a foreign corporation that was an instrumentality of the Saudi Arabian government, plaintiff was a U.S. citizen who was a pilot employed and eventually fired by defendant in Saudi Arabia, Saudi Arabian law exclusively governed the case, and defendant sought to have the case transferred *to its home forum* of Saudi Arabia where all documents and witnesses were located. That overwhelming set of facts was sufficient to overcome substantial deference to the U.S. citizen's choice of forum but it is a far cry from this case where Chase was sued *in its own home forum* on at least two counts that even the district court conceded were based on conduct by Chase New York personnel. *See, e.g.*, Pet. App. B12, B14.[2]

Because the virtually non-existent deference applied by the Second Circuit effectively vitiates the "freedom of access" granted by the U.S.-Liberian treaty and conflicts with the def-

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[2] The two district court cases cited by respondent likewise involved foreign defendants being dragged away from their home fora and seeking to return to their home fora outside the United States. *Meridian Seafood Prods., Inc.* v. *Fianzas Monterrey, S.A.*, 149 F. Supp.2d 1234, 1236, 1238 (S.D. Cal. 2001) (Mexican defendant with no business, employees, or offices in California, seeking transfer to home Mexican forum for case involving exclusively Mexican business activity governed exclusively by Mexican law); *Donald G. Atteberry, DVM, P.A.* v. *Barclays Bank PLC* (*In re Donald G. Atteberry, DVM, P.A.)*, 159 B.R. 1, 7-8 (D. Kan. 1993) (English defendant with no apparent contacts with Kansas seeking transfer to home English forum for case involving money wired to, deposited, and held in England and governed exclusively by English law). Again, such circumstances are overwhelmingly more inconvenient than Chase being sued in its home forum, and hence understandably sufficient to overcome even the significant deference accorded citizen-plaintiffs.

erence accorded by other circuits based on citizen-status *per se*, this Court should grant certiorari.

B. Plaintiff's Choice of Defendant's Home Forum.

Respondent makes no effort to reconcile the Second Circuit's refusal to apply substantial deference to plaintiff's choice of *defendant's* home forum with the considerable deference given such a choice by four other circuits. *See* Pet. 12-13 (citing cases from the First, Third, Eighth, and Tenth Circuits). Indeed, respondent says absolutely nothing in defense of the Second Circuit's complete disregard of the choice of defendant's home forum as an element of deference. Instead, respondent merely repeats the various reasons why London would be an appropriate alternative, BIO 13, which simply ignores the question. The very point of deference is that it creates a substantial barrier to dismissal regardless of the availability of other appropriate fora.

The substantial deference due the selection of a defendant's home forum was squarely raised and expressly rejected below and the Second Circuit's denial of deference is in direct conflict with substantial deference given to such a selection in other circuits. Respondent does not deny the conflict, does not defend the Second Circuit's treatment of this deference issue, and offers not a single reason why this Court should not grant certiorari to resolve the issue.

II. THE SECOND CIRCUIT ELIMINATED WITNESS UNWILLINGNESS TO APPEAR AS AN ELEMENT OF *GILBERT*'S COMPULSORY-PROCESS FACTOR, IN CONFLICT WITH OTHER CIRCUITS.

As with the deference conflicts, respondent makes no attempt to deny the conflict created by the Second Circuit's refusal to require some evidence of "unwillingness" to appear on the part of non-resident witnesses as an element of *Gilbert's* compulsory-process factor. Pet. 16 (citing cases from First, Fifth, and Ninth Circuits). Instead, respondent simply asserts that this Court's discussion of witnesses in *Piper Air-*

craft Co. v. *Reyno*, 454 U.S. 235, 258-59 (1981), contains no such requirement. BIO 14-15. Nothing in *Piper* even remotely contradicts the element of unwillingness established by *Gilbert* as part of the compulsory-process factor.

In *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 508 (1947), this Court established a clear dichotomy in the private interest factors relating to witnesses. Where non-resident witnesses are "willing" to attend trial in the chosen forum, the only witness consideration in the *Gilbert* balance is the "cost of obtaining [their] attendance," 330 U.S. at 508 – a consideration the district court found irrelevant here given the presence of numerous witnesses in both competing fora. Pet. App. B16. The availability of compulsory process only comes into play for the "attendance of unwilling" witnesses, 330 U.S. at 508, and has no legal significance in the absence of some evidence of such unwillingness.

This Court's observation in *Piper* that defendants are not required to particularize the testimony of each prospective witness in no way contradicts the willing/unwilling witness dichotomy established by *Gilbert*. Rather, *Piper* contains the perfectly consistent requirement that defendants "must provide enough information to enable the District Court to balance the parties' interests * * * [such as] affidavits *describing the evidentiary problems* they would face if the trial were held in the United States." 454 U.S. at 258-59 (emphasis added).

In *Piper* this Court found that the defendants had indeed provided "affidavits describing the evidentiary problems they would face," and those affidavits made it self-evident that the witnesses in question – hostile third parties to whom defendants intended to shift the blame for the air crash at issue – would be unwilling to appear voluntarily in the United States. *Id.* at 259 & n. 27 (foreign witnesses to include, *inter alia*, "the relatives of the decedents; the owners and employees of McDonald; the persons responsible for the training and licensing of the pilot; the persons responsible for servicing and maintaining the aircraft"; noting "problems posed by the in-

ability to implead potential third-party defendants" for claims "that the accident was caused not by a design defect, but rather by the negligence of the pilot, the plane's owners, or the charter company"). The "unwillingness" of those hostile witnesses to appear voluntarily and hence the need for compulsory process was self-evident and amply supported by the record and the findings in *Piper*.

In the present case, by contrast, there was neither any evidence nor any finding of "evidentiary problems" given that the supposedly non-resident witnesses identified by Chase were never even claimed to be unwilling or unable to appear in the United States.[3] Indeed, such witnesses were all self-evidently *friendly* to Chase and hostile to Springwell, the precise opposite of the case in *Piper*. The mere fact that they supposedly resided in England rather than the U.S. is not itself any "problem," particularly in light of the district court's express finding that the costs of having witnesses travel to either forum was *not* a problem and hence *not* a factor favoring dismissal. Pet. App. B16. Absent evidence and findings that witnesses were unwilling or unable to appear in New York, the courts below lacked the "information" required to count this factor against a New York forum and thus erred as a matter of law in weighing it strongly in favor of dismissal.[4]

In any event, however, respondent's misreading of *Piper* does nothing to reconcile the conflict with three other circuits that recognize the requirement of "unwillingness" well after this Court's *Piper* decision. Given that the compulsory-

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[3] As it turns out, several of the witnesses alleged to reside in London in fact *do not reside there* and are no more subject to English compulsory process than to American compulsory process. Springwell Br. 39-40; Springwell Reply 18.

[4] Indeed, the refusal to require some showing that Chase's witnesses would be unwilling to appear in New York was especially perverse given the simultaneous rejection of the need for compulsory process over New York witnesses because Springwell had not "demonstrated" that such witnesses "would be unavailable at a trial in London." Pet. App. B16.

process factor is the *only* private interest even claimed to favor dismissal, BIO 10; Pet. App. B14-16, and was conceded to not "rise to the level of vexation or oppressiveness," Pet. App. B16, if the courts below erred as a matter of law by even considering that factor absent some indication of witness unwillingness to appear in New York, then dismissal would be plain error. This case thus presents an ideal vehicle for considering the proper legal scope of the compulsory-process factor within the overall *Gilbert* balance and for resolving the conflict created by the Second Circuit.

III. THE SECOND CIRCUIT ERRONEOUSLY APPLIED *GILBERT*'S FOREIGN-LAW FACTOR TO A CASE OF MIXED LAW OF COMMON HERITAGE.

As amply explained in the Petition, where both competing fora will have to apply some foreign law and the mixed law at issue shares a familiar and common heritage, the foreign-law factor should not play a significant role in the *Gilbert* balance. Various other courts have recognized the limited significance of that factor, Pet. 17-18, yet the courts below counted it "strongly" in favor of dismissal. Pet. App. A18.

Chase's only response is to suggest that the scope of the foreign-law factor is merely a factual issue that should not be revisited. BIO 15-16. But the question presented goes not to the facts or even the choice of law determinations made by the courts below. Rather, *assuming* that both English and New York law would apply to different parts of this case, as expressly found by the district court, Pet. App. B14 (New York law would apply to "negligent supervision claims as they relate to CMB New York and plaintiffs' conversion claims, which allege misfeasance on the part of CMB New York directly"), petitioner contends that such a finding of mixed law should have little or no *legal* significance in the *Gilbert* balance. The question presented thus asks for an up or down answer to a straight-forward question. At issue are

the legal constraints on the scope of this *Gilbert* factor, not the factual elements of that factor.

Once again, this case is an apt vehicle for addressing the limits of the foreign-law factor given that it was one of only two public-interest factors at issue. Error regarding the foreign-law factor thus would undermine an already thin balance of interests and tip the scales to a different result.

IV. THIS CASE RAISES IMPORTANT AND RECURRING NATIONAL ISSUES.

The importance and frequency of international disputes between U.S. and foreign companies involved in business activities spanning multiple fora are unchallenged by respondent. Similarly unchallenged is the significance of having predictably accessible venues for resolving disputes that arise from such business. The *forum non conveniens* questions presented by the Petition will affect disputes well beyond this individual case and thus require both a correct and consistent resolution that only this Court can provide. Multiple circuit conflicts and the virtual erasure of bilateral treaty rights concerning freedom of access to the courts will only complicate and hinder the efficient conduct of international business and undermine the credibility of the federal courts as effective arbiters of disputes with U.S. companies. Indeed, in an era where U.S. financial institutions are making a habit out of abusing the trust of their clients and customers around the world, restricting access to U.S. courts for complaints alleging such abuse and fraud would seem especially inappropriate. This case is an ideal vehicle for addressing significant questions in an area of law that has not received substantial attention from this Court since *Piper*, and that has suffered accordingly from inconsistency and confusion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ERIK S. JAFFE
Counsel of record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Petitioner

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